No. 08-328
Vide 07-1428
Title: Frank Ricci, et al., Petitioners
v.
John DeStefano, et al.
Docketed: September 11, 2008
Lower Ct: United States Court of Appeals for the Second Circuit
Case Nos.: (06-4996-cv)
Decision Date: June 9, 2008
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Sep 8 2008	Petition for a writ of certiorari filed. (Response due October 14, 2008)
Sep 24 2008	Order extending time to file response to petition to and including November 13, 2008.
Oct 14 2008	Brief amici curiae of Center for Individual Rights, et al. filed.
Nov 13 2008	Brief of respondent City of New Haven in opposition filed. VIDED.
Nov 21 2008	Reply of petitioners Frank Ricci, et al. filed. VIDED. (Distributed)
Nov 25 2008	DISTRIBUTED for Conference of December 12, 2008.
Jan 5 2009	DISTRIBUTED for Conference of January 9, 2009.
Jan 9 2009	Petition GRANTED the case is consolidated with No. 07-1428 and a total of one hour is allotted for oral argument. The briefs of petitioners are to be filed on or before Thursday, February 19, 2009. The briefs of respondents are to be filed on or before Wednesday, March 18, 2009. Reply briefs, if any, are to be filed in accordance with Rule 25.3 of the Rules of this Court.
Jan 28 2009	Consent to the filing of amicus briefs, in support of either party or neither party, received from counsel for the petitioners. VIDED.
Feb 13 2009	Consent to the filing of amicus briefs, in support of either party or neither party, received from counsel for the respondent City of New Haven. VIDED.
Feb 19 2009	Joint appendix filed. (Statement of costs filed) VIDED.
Feb 19 2009	Brief of petitioners Frank Ricci, et al. filed. VIDED.
Feb 23 2009	Consent to the filing of amicus briefs, in support of either party or neither party, received from counsel for respondents John De Stefano, et al.
Feb 23 2009	SET FOR ARGUMENT ON Wednesday, April 22, 2009
Feb 24 2009	Brief amicus curiae of Concerned American Firefighters Association, Philadelphia Chapter filed. VIDED.
Feb 25 2009	Brief amici curiae of Cato Institute, et al. filed. VIDED.
Feb 25 2009	Brief amici curiae of Pacific Legal Foundation, et al. filed. VIDED.
Feb 25 2009	Brief amicus curiae of Kedar Bhatia filed. VIDED. (Distributed)
Feb 26 2009	Brief amicus curiae of United States supporting Vacatur and Remand filed. VIDED.
Feb 26 2009	Brief amicus curiae of Mountain States Legal Foundation filed.
Feb 26 2009	Brief amicus curiae of Claremont Institute Center for Constitutional Jurisprudence filed. VIDED.
Feb 26 2009	Brief amicus curiae of Eagle Forum Education & Legal Defense Fund filed. (Distributed)
Feb 26 2009	Brief amicus curiae of American Civil Rights Union filed. VIDED. (Distributed)
Feb 26 2009	Brief amicus curiae of Bridgeport Firefighters for Merit Employment, Inc. filed. VIDED.

	(Distributed)
Feb 26 2009	Brief amicus curiae of Anti-Defamation League in support of neither party filed. VIDED. (Distributed)
Feb 26 2009	Brief amici curiae of Joe Oakley, et al. filed. VIDED. (Distributed)
Feb 26 2009	Brief amici curiae of National Association of Police Organizations filed. VIDED. (Distributed)
Feb 26 2009	Brief amici curiae of Law Professors and Other Academics filed. VIDED. (Distributed)
Feb 26 2009	Brief amici curiae of Center for Individual Rights, et al. filed. VIDED. (Distributed)
Feb 27 2009	CIRCULATED.
Mar 18 2009	Record for the U.S.D.C. for the District of Connecticut is ellectronically filed.
Mar 18 2009	Brief of respondents John DeStefano, et al. filed. VIDED. (Distributed)
Mar 20 2009	Record received from U.S.C.A. for 2nd Circuit. (1 box).
Mar 25 2009	Brief amicus curiae of NAACP Legal Defense & Educational Fund, Inc. filed. VIDED. (Distributed)
Mar 25 2009	Brief amici curiae of Maryland, et al. filed. VIDED. (Distributed)
Mar 25 2009	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed. VIDED.
Mar 25 2009	Brief amicus curiae of Society for Human Resource Management filed. VIDED. (Distributed)
Mar 25 2009	Brief amici curiae of International Association of Hispanic Firefighters, et al. filed. VIDED. (Distributed)
Mar 25 2009	Brief amici curiae of International Municipal Lawyers Association, et al. filed. VIDED. (Distributed)
Mar 25 2009	Brief amici curiae of Industrial-Organizational Psychologists filed. VIDED. (Distributed)
Mar 25 2009	Brief amici curiae of Lawyers' Committee for Civil Rights Under Law, et al. filed. VIDED. (Distributed)
Mar 25 2009	Brief amicus curiae of Opportunity Agenda filed. VIDED. (Distributed)
Mar 25 2009	Brief amicus curiae of Equal Employment Advisory Council filed. VIDED. (Distributed)
Mar 25 2009	Brief amici curiae of National Partnership for Women & Families, et al. filed. VIDED. (Distributed)
Mar 25 2009	Brief amici curiae of American Civil Liberties Union, et al. filed. VIDED. (Distributed)
Mar 25 2009	Brief amicus curiae of New York Law School Racial Justice Project filed. VIDED. (Distributed)
Mar 25 2009	Brief amici curiae of Asian American Justice Center, et al. filed. VIDED. (Distributed)
Mar 25 2009	Brief amici curiae of International Association of Black Professional Fire Fighters, et al. filed. VIDED. (Distributed)
Mar 25 2009	Record recevied from U.S.D.C. for the District of Connecticut. (1 box)
Apr 6 2009	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED. and the time is divided as follows: 30 minutes to petitioners, 30 minutes to respondents, and 10 minutes to the Solicitor General.
Apr 7 2009	Reply of petitioners Frank Ricci, et al. filed. VIDED. (Distributed)
Apr 22 2009	Argued. For petitioners: Gregory S. Coleman, Austin, Tex. For United States as amicus curiae: Edwin S. Kneedler, Deputy Solicitor General, Department of Justice, Washington, D.C. For respondents: Christopher J. Meade, New York, N.Y.

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Supreme Court, U.S.
FILED

No. _____

08-328 SEP 8 - 2008

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In The

Supreme Court of the United States

FRANK RICCI, ET AL.,

Petitioners,

v.

JOHN DESTEFANO, KAREN DUBOIS-WALTON, THOMAS UDE, JR., TINA BURGETT, BOISE KIMBER, MALCOLM WEBER, ZELMA TIRADO, AND CITY OF NEW HAVEN,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case presents the question whether Title VII and the Equal Protection Clause allow a government employer to reject the results of a civil-service selection process because it does not like the racial distribution of the results. Specifically:

1. When a content-valid civil-service examination and race-neutral selection process yield unintended racially disproportionate results, do a municipality and its officials racially discriminate in violation of the Equal Protection Clause or Title VII when they reject the results and the successful candidates to achieve racial proportionality in candidates selected?

2. Does an employer violate 42 U.S.C. §2000e-2(*l*), which makes it unlawful for employers "to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race," when it rejects the results of such tests because of the race of the successful candidates?

PARTIES TO THE PROCEEDINGS

The additional petitioners are Michael Blatchley, Greg Boivin, Gary Carbone, Michael Christoforo, Ryan DiVito, Steven Durand, William Gambardella, Brian Jooss, Matthew Marcarelli, Thomas J. Michaels, Sean Patton, Christopher Parker, Edward Riordan, Timothy Scanlon, Benjamin Vargas, John Vendetto, and Mark Vendetto.

James Kottage and Kevin Roxbee were plaintiffs-appellants below with respect to claims not relevant in this petition. They have an interest in this proceeding only to the extent of their interest in those claims.

All respondents are listed in the caption. At all times relevant to this action, John DeStefano was Mayor of the City of New Haven, Karen Dubois-Walton was Chief Administrative Officer, Thomas Ude, Jr. was Corporation Counsel, Tina Burgett was Director of Personnel, and Boise Kimber was a member of the Board of Fire Commissioners. Respondents Malcolm Weber and Zelma Tirado were members of the City's Civil Service Board.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully ask the Court to issue a writ of certiorari to review the final judgment of the United States Court of Appeals for the Second Circuit. This case gives the Court the opportunity to correct the Second Circuit's misapplication of Title VII and the Equal Protection Clause to civil service promotions, in a decision that conflicts with the decisions of other circuits and this Court, and that drew a strenuous dissent from six judges who thought the case should have been reheard en banc or failing that should be heard by this Court.

OPINION AND JUDGMENT BELOW

The district court's opinion, now reported at 554 F.Supp.2d 142, is reprinted in the Appendix at App. 5a-51a. The court of appeals's unpublished order is unofficially reported at 2008 WL 410436 and reprinted at App. 1a-4a. The *per curiam* opinion withdrawing the earlier order is reported at 530 F.3d 87 and reprinted at Supp.App. 1a-3a. The order denying rehearing en banc is reported at 530 F.3d 88 and reprinted at Supp.App. 4a-36a.

STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. §1331. The court of appeals issued a judgment on February 15, 2008, subsequently withdrew the

summary order on which that judgment was based, and entered a new judgment on June 9, 2008.[1] This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."

Pertinent provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2 *et seq.*, are lengthy and reprinted at App. 54a-58a.

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[1] Petitioners filed a petition for writ of certiorari for review of the Court of Appeals' February 15 judgment, No. 07-1428. However, the Second Circuit withdrew the order underlying that judgment and entered a new judgment on June 9, potentially rendering that petition moot. Petitioners therefore file this petition raising the same set of issues for the Court's review, and are moving contemporaneously to consolidate the petitions. Citations in the forms App., Supp.App., and Supp.Br. are to the Appendix, Supplemental Appendix, and Supplemental Brief submitted in that earlier petition, respectively.

STATEMENT OF THE CASE

Introduction

The case presents the question whether Title VII and the Equal Protection Clause allow a government employer to reject the results of a civil service examination and selection process because it does not like the racial distribution of the test scores. In 2003 the City of New Haven sought to fill captain and lieutenant vacancies in its fire department. Petitioners, New Haven firefighters and lieutenants, qualified for promotion to command positions pursuant to job-related examinations and merit-selection rules mandated by local law. Based on the race of the successful candidates,[2] city officials refused to promote petitioners and left the positions vacant in response to the racial distribution of the exam results, asserting their actions constituted "voluntary compliance with Title VII."

Petitioners sued alleging violations of Title VII and the Equal Protection Clause. They sought summary judgment based on respondents' race-based motivations, the undisputed validity of the exams, and the conceded absence of proof of an equally valid alternative to the exams with less racially disparate impact, and on the failure of respondents' action to survive strict scrutiny under the Equal Protection Clause.

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[2] All petitioners are white; petitioner Benjamin Vargas is Hispanic.

Respondents admittedly acted neither to remedy the effects of prior unlawful discrimination against minorities nor to achieve diversity. Instead, respondents insisted that it was irrelevant whether the exams were valid and whether there were any equally valid alternatives; they relied solely on their professed "good faith" belief that promoting petitioners based on the exams would violate Title VII. The correctness of that belief, they asserted, was also immaterial.

The district court granted respondents' cross-motion for summary judgment, finding that respondents wished to avoid "public criticism" for a perceived lack of diversity and the "political consequences" of a potential disparate impact suit by minorities. It did so notwithstanding what it described as "shortcomings" in the evidence of any available, equally valid alternative examination process with less racially adverse impact. App. 47a.

Breaking from other courts of appeals, the Second Circuit held that a promotion examination's unintended disproportionate racial results permit municipalities to reject successful candidates based on their race, a judgment that finds no support in the statute or the Court's Title VII decisions. Supp.App. 4a-6a. The Second Circuit further held the Equal Protection Clause inapplicable to such actions and thus refused to apply strict scrutiny. *Ibid.*

New Haven Civil-Service Practices

New Haven's Charter and Civil Service Regulations mandate hiring and promotions based strictly

on merit as determined by competitive examination. After each examination, the Civil Service Board must certify a list of those eligible for promotion. A "rule-of-three" requires filling each vacancy from among the top three scorers on the list to curtail political patronage and other improper favoritism and to ensure selection of the most knowledgeable candidates. App. 74a-86a.

The Connecticut Supreme Court has consistently mandated strict compliance with civil service laws, citing the public interest in the most able workforce free of the corruption and ills of the spoils system. See, *e.g.*, *Kelly* v. *City of New Haven*, 881 A.2d 978, 1000-1004 (Conn. 2005). Yet by 2004, the DeStefano administration had drawn multiple, stern rebukes from state judges for "blatant lawlessness" in employing "charades" and "subterfuges" to flagrantly subvert merit selection rules[3] and stood accused of intentionally discriminating against whites and manipulating promotion exam results for political gain. *Ibid.* Respondent Ude, the city counsel, citing his disagreement with these judges, dismissed their opinions as nonbinding and authorized city officials to continue the illegal practices. App. 935a-937a.

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[3] See *Henry* v. *Civil Serv. Comm'n*, 2001 WL 862658 (Conn. Super. July 3, 2001); *Bombalicki* v. *Pastore*, 2001 WL 267617 (Conn. Super. Feb. 28, 2001), aff'd, 71 Conn. App. 835 (2002); *Hurley* v. *City of New Haven*, 2006 WL 1609974 (Conn. Super. May 23, 2006).

Respondents engaged Industrial/Organizational Solutions, Inc. ("IOS"), a professional testing firm with experience in public safety, to develop the 2003 exams. The exams were designed to screen out those without the knowledge, skills, and abilities (KSAs) necessary for minimally competent performance in the positions. Since New Haven routinely experiences racial disparities in testing outcomes, IOS went to great lengths to mitigate such impact as far as possible without compromising the integrity of the exams. IOS analyzed the jobs and validated the tests at length and in detail in accordance with EEOC-recommended practices. See 29 C.F.R. §§1607.5, 1607.14, 1607.16; App. 329a-335a.

The exams consisted of a written job knowledge examination followed by a comprehensive structured oral assessment of applicants' skills and abilities to command others in emergency response. Applicants were permitted to proceed to the second phase irrespective of their performance on the written exam. The cutoff composite score was calibrated to equate with minimal competence.

All candidates were race-coded. The results revealed racial disparities in pass rates and levels of KSAs for those who did pass, mirroring adverse impact ratios in previous exams. App. 384a-385a, 423a-427a, 950a-957a. Because of the limited number of vacancies, civil service rules meant that the new lieutenants "w[ould] all be white" and non-Hispanic as

would all but one or possibly two Hispanic captains. App. 439a-445a, 465a-476a.

Respondent Kimber, a local preacher and valuable vote-getter for Mayor DeStefano, who served as an influential member of the Board of Fire Commissioners, contacted the mayor's office and made it clear he wanted the promotions scuttled after learning of the race of the top scorers. App. 812a-816a, 882a. In respondents' early strategizing to that end, *e.g.*, App. 449a; see App. 446a-459a, they agreed to adopt publicly a neutral position on certification while privately collaborating toward Kimber's desired result.

Respondents' initial effort to impugn the validity of the examinations failed when IOS refused to concede nonexistent flaws in the tests. According to IOS Vice-President Chad Legel, respondents rebuffed his attempts to discuss validity and focused instead on the "racial" and "political" overtones of the situation. App. 329a-335a. Industry protocol called for issuing a technical report which elaborates in detail the exams' content validity and scoring methodology and establishes lawful use of test results for selection notwithstanding adverse impact. *Ibid.* Respondents had previously accepted such reports and proceeded with selections. See App. 958a-1011a. IOS stood ready to issue a technical report validating the 2003 exams, but respondents prevented its issuance. App. 329a-335a.

What would have been a ministerial certification[4] of the captain and lieutenant lists by the Board was interrupted by a letter from respondent Ude raising the specter of a Title VII violation and respondents' providing to the Board eligibility lists that included candidates' race codes but, unprecedentedly, were name-redacted.[5] Despite IOS's explicit request that respondent Burgett share with the Board IOS's letter noting its confidence in the exams' validity and respondents' decision to abort production of the validity report, she did not do so. App. 190a-191a, 287a, 336a-339a, 429a-436a.

The Board met four times. Attempting to establish the availability of equally valid alternative tests with less adverse impact, respondents solicited three professionals to offer opinions to the Board, among them Christopher Hornick, IOS's fiercest business competitor, who spoke briefly to the Board by telephone. Neither Hornick nor Janet Helms, a professor of race and culture with no expertise in public safety, examined the tests, their development, or validation. App. 545a-563a, 569a-574a, 1030a. The third consultant, and the only one to actually study the exams, was Vincent Lewis, a highly credentialed expert in fire and homeland security services. Lewis, who is

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[4] New Haven civil service regulations define "certify" as "[t]he process of supplying an appointing authority with the names of eligibles for appointment." App. 89a.

[5] Petitioners submitted to the district court mock eligibility lists showing the successful candidates' names in rank order. App. 390a, 437a-438a.

African-American, thought well of the exams and believed they measured the KSAs that commanders must possess. App. 563a-569a.

At the Board's final meeting, respondents urged abandoning the lists in favor of unspecified alternatives, citing Hornick's remarks and dismissing Lewis's. Two alderpersons urged the Board not to certify for the sake of "diversity" and "civil rights" requirements. App. 458a-459a, 484a-489a, 575a-582a. Not allowed to speak were the NHFD's Chief and (African-American) Assistant Chief, although both were involved in the exam development process and selecting the exams' syllabi. Both thought the exams were fair and valid and the results should be respected. Although respondents denied any improper motive in excluding the NHFD's top two officials, Fire Commissioner Kimber was allowed to disrupt the Board's proceedings, voice objections to the promotions, and threaten Board members with political reprisals. App. 389a-390a, 467a-468a, 817a-818a, 833a, 846a-852a. The Board deadlocked and the promotions were scuttled.[6] App. 586a-589a.

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[6] Only four members voted; respondents Weber and Tirado voted against certification. The nonvoting fifth member was the sister of one of the unsuccessful minority candidates who met with Dubois-Walton to influence the city's positions. App. 829a-831a.

The Proceedings Below

Petitioners sued, alleging violations of Title VII and the Equal Protection Clause. Respondents conceded, in admissions disregarded by the district court, that they "never alleged that [they] took any action to remedy prior discrimination" and that achieving racial diversity in the NHFD ranks was wholly irrelevant. The decision, they insisted, stemmed solely from their "good faith" belief that promoting the petitioners would violate Title VII. App. 938a-947a, 1013a-1037a.

Dubois-Walton testified that it was never respondents' position that the exams were invalid. She understood IOS validated the tests. The city's chief civil service examiner could discern no flaws in the written exams. Candidate ratings in the oral assessment, conducted by ten three-member panels of fire service professionals recruited nationwide, demonstrated high levels of reliability and consistency within and across panels. What Dubois-Walton understood from Hornick was that exam alternatives, particularly the "assessment center" approach to testing, might exist that "may have" less adverse impact. Petitioners introduced Hornick's own publications, which directly contradict this suggestion. App. 390a, 592a, 746a-804a, 848a, 853a-856a.

Respondents conceded they had no evidence the exams were invalid. When pressed to identify a specific alternative, they advised the district court that they hoped to "conduct studies" and "explore" for

one, and considered the question as one "for another day." App. 1022a, 1027a, 1016a-1038a.

The district court granted summary judgment for respondents on petitioners' Title VII and equal protection claims. Despite the absence of any equally valid alternatives, the district court nonetheless stated: "[I]t is not the case that defendants must certify a test where they cannot pinpoint its deficiency explaining its disparate impact under the four-fifths rule simply because they have not yet formulated a better selection method."[7] App. 34a. Resolving the contested issue of respondents' motivation, the district court found

> "[respondents] acted based on the following concerns: that the test had a statistically adverse impact on African-American and Hispanic examinees; that promoting off this list would undermine their goal of diversity in the Fire Department and would fail to develop managerial role models for aspiring firefighters; that it would subject the City to public criticism; and that it would likely subject the City to Title VII lawsuits from minority applicants that, for political reasons, the City did not want to defend." App. 47a.

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[7] EEOC guidelines advise that a "selection rate for any race, sex, or ethnic group which is less than four-fifths . . . of the rate for the group with the highest rate will generally be regarded . . . as evidence of adverse impact." 29 C.F.R. §1607.4(D).

Elsewhere, the court observed the tests' "undesirable outcome" could "subject the City to Title VII litigation by minorit[ies] and the City's leadership to political consequences." Addressing petitioners' assertion that respondents' professed fidelity to Title VII was a pretext for intentional race discrimination against them and patronage benefits for the Mayor's and Kimber's political allies, the court disagreed the "political context" altered the analysis. Even if "political favoritism or motivations" were "intertwined with the race concern," that "does not suffice" to establish a violation of rights. App. 24a, 43a, 47a. Relying principally on holdings predating the 1991 amendments to Title VII and this Court's modern equal protection jurisprudence, the district court found no racial classification occurred.

The Second Circuit, by summary order entered February 15, 2008, adopted the district court's opinion and affirmed its judgment, concluding that "the [Board] found itself in the unfortunate position of having no good alternatives . . . [B]ecause the Board, in refusing to validate the exams, was simply trying to fulfill its obligations under Title VII when confronted with test results that had a disproportionate racial impact, its actions were protected." App. 3a-4a.

After the panel entered judgment, a judge of the court of appeals *sua sponte* requested a poll on rehearing en banc. On June 9, 2008, after the poll was concluded but before the court had announced the poll or its result, the panel withdrew its summary order and simultaneously issued a *per curiam* opinion

virtually identical to the summary order.[8] See Supp.App. 4a-6a. The clerk of the court of appeals entered a new judgment that same day.

Three days later, the Second Circuit announced it had voted 7-6 to deny rehearing en banc. The panel apparently converted its summary order to a binding precedential opinion while the opinions on denial of rehearing en banc were in production. Judge Parker, concurring in the denial of rehearing, argued that the panel opinion comported with prior circuit precedents, particularly *Bushey* v. *New York State Civil Service Commission*, 733 F.2d 220 (CA2 1984), that the refusal to certify the test results was "facially race-neutral," and that respondents' purported "desire to comply with, and avoid liability under, Title VII" did not constitute intent to discriminate. Supp.App. 7a-10a. Judge Calabresi, also concurring, opined that the court was foreclosed from reaching the interesting question—whether a government incurs liability for "race-neutral actions that have racially significant consequences" and that are "motivated only by a desire to comply with federal anti-discrimination law"—by petitioners' failure, in his view, to argue that respondents had mixed motives.[9] Supp.App. 30a-32a.

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[8] The panel's *per curiam* opinion deleted one word—"substantially"—from the first sentence of the summary order.

[9] Judge Calabresi was incorrect on this point. See Supp.Br. 6 n.5, 9 n.7 (noting that petitioners addressed this issue below, stating that mixed motives is an affirmative defense and

(Continued on following page)

Writing for all six dissenting judges, Judge Cabranes observed that this case "raises important questions of first impression in [the] Circuit—and indeed, in the nation—regarding the application of the Fourteenth Amendment's Equal Protection Clause and Title VII's prohibition on discriminatory employment practices." Supp.App. 11a-12a. He noted that the majority's evident view that "any race-based employment decision undertaken to avoid a threatened or perceived Title VII" violation "raises novel questions that are indisputably of exceptional importance," Supp.App. 11a-12a, 28a-29a, among them:

> "Does the Equal Protection Clause prohibit a municipal employer from discarding examination results on the ground that too many applicants of one race received high scores and in the hope that a future test would yield more high-scoring applicants of other races? Does such a practice constitute an unconstitutional racial quota or set-aside? Should the burden-shifting framework applicable to claims of pretextual discrimination ever apply to a claim of explicit race-based

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suggesting that a workable application of mixed-motive analysis in this case is problematic because respondents never placed into the mix a *non*-race-based reason for their actions). In addition, the Center for Individual Rights, in an amicus brief to the court of appeals, noted the district court erroneously characterized this case, and specifically the question of respondents' motivation in refusing to promote petitioners, as falling under the familiar burden-shifting framework of *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973).

> discrimination in violation of Title VII? If a municipal employer claims that a race-based action was undertaken in order to comply with Title VII, what showing must the employer make to substantiate that claim?" Supp.App. 13a.

Judge Cabranes declared the dissenters' "hope that the Supreme Court will resolve the issues of great significance raised by this case" and affirmed that petitioners' claims "are worthy of that review." Supp.App. 13a, 30a.[10]

REASONS FOR GRANTING THE PETITION

This case presents a clear opportunity to settle issues that continue to plague state and municipal civil service by sparking competing claims of discrimination and reverse discrimination. These issues have implications in a broad range of merit and other selection mechanisms throughout our society. Neither the Constitution, Congress, nor this Court has authorized public officials and lower federal courts

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[10] Indeed, the fact that the "difficult issues" presented in this case are "sharply defined for the Supreme Court's consideration" provided Judge Katzmann's deciding vote against rehearing en banc. Supp.App. 6a. Chief Judge Jacobs, dissenting, disagreed with Judge Katzmann about the issue of en banc rehearing but agreed that the case presented "exceptionally important issues" that are "important enough to warrant Supreme Court review." Supp.App. 36a.

to engage in intentional race discrimination by reintroducing race-consciousness into a merit selection process that had been purged of it, under the guise of avoiding phantom Title VII liability. To justify that result the Second Circuit adopted a radical disparate-impact theory that effectively nullifies important exemptions and other provisions in Title VII and emboldens those who view the Equal Protection Clause and Title VII as guarantees not of equal opportunity but of equal results. That theory sets the Second Circuit squarely at odds both with the holdings of other circuits and with this Court's interpretations of the Clause and Title VII.

I. THE SECOND CIRCUIT'S SUBSTANTIAL DEPARTURE FROM THIS COURT'S EQUAL PROTECTION HOLDINGS WIDENS ITS DIVISION FROM OTHER CIRCUITS.

A. The Refusal To Apply Strict Scrutiny Is At Odds With This Court's And Other Circuits' Holdings.

"Racial and ethnic distinctions of any sort are inherently suspect and . . . call for the most exacting judicial examination." *Wygant* v. *Jackson Board of Educ.*, 476 U.S. 267, 273 (1986) (plurality opinion) (quoting *Regents of Univ. of Cal.* v. *Bakke*, 438 U.S. 265, 291 (1978)). The court of appeals considered that respondents reacted to the "racial distribution of the results" and were concerned that "too many whites and not enough minorities would be promoted," and

that but for these concerns, petitioners "would have had an opportunity to be promoted," but nonetheless refused to subject this race-based deprivation to strict scrutiny.[11] App. 24a-25a. The court reasoned that since "the result was the same for all . . . and nobody was promoted," there was no racial classification. App. 45a. This conclusion squarely conflicts with the decision of the Eleventh Circuit which, under similar circumstances, held "that a decision not to *create* new positions that is based solely upon the race and gender of the next eligible candidates for promotion" constitutes a racial classification that violates the Equal Protection Clause. *Williams* v. *Consol. City of Jacksonville*, 341 F.3d 1261, 1269 (CA11 2003).

The Second Circuit's error is apparent: those who fail exams have no right to be promoted; to the contrary, under local law they are excluded from consideration. Local law entitled petitioners not to be treated the same as everyone who took the exam, but treated differently based on whether they passed the exams and the level of KSAs their exam performance demonstrated. Respondents did not treat petitioners the same as others without regard to race; they took action, because of petitioners' race, to prevent petitioners from being promoted when they would otherwise have been. For that reason, the Second

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[11] Because the Second Circuit adopted the decision of the district court, the reasoning in the district court's opinion on summary judgment is attributed to and quoted as that of the court of appeals.

Circuit was incorrect (and cavalier) to characterize their injuries as negligible.[12] Moreover, the court's reasoning ignores that it was petitioners' race that directly and admittedly drove respondents' decision to promote no one. This is especially curious because, for Title VII purposes, the court assumed petitioners suffered a race-based adverse employment action, while incongruously holding that no racial classification occurred for equal protection purposes. App. 25a.

The Court has clearly held that "[r]ace-based government decision making is categorically prohibited unless narrowly tailored to serve a compelling interest," *Parents Involved in Cmty. Sch.* v. *Seattle Sch. Dist. No. 1*, 127 S.Ct. 2738, 2770 (2006) (Thomas, J., concurring), and has confined it to narrowly tailored remedies for prior constitutional violations and use as a nondispositive factor in professional-school

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[12] The court held petitioners' injuries amounted to nothing beyond "frustration" and "uncertainty" about their futures, App. 3a, 42a n.11, an incorrect characterization upon which the court rested its conclusion that no race-based "injury" or "disadvantage" occurred to trigger constitutional scrutiny. Petitioners were deprived of salary increases attendant to promotion, losses which continue to accrue and depress their pensions. The court further ignored that petitioners, their careers stalled in 2004, remain ineligible for further advancement, as incumbency as lieutenant or captain is a prerequisite for promotion to still higher ranks. And, in doing so, the court likewise ignored Title VII's provision prohibiting actions which "would deprive or tend to deprive any individual of employment *opportunities* or otherwise adversely affect his status" because of his race. 42 U.S.C. §2000e-2(a)(2) (emphasis added).

admissions. *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469 (1989); *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200 (1995); *Grutter* v. *Bollinger*, 539 U.S. 306 (2003). Outside these contexts, the "exacting scrutiny" required by the Equal Protection Clause "has proven automatically fatal in most cases." *Parents Involved*, 127 S.Ct., at 2770 (Thomas, J., concurring) (quotation omitted). Moreover, before a government may use race in making decisions, it must have "a strong basis in evidence for its conclusion that remedial action was necessary." *Croson*, 488 U.S., at 500 (quoting *Wygant*, 476 U.S., at 277 (plurality opinion)).

The Second Circuit's conclusion that respondents were "protected" because they "[w]ere simply trying to fulfill [their] obligations under Title VII," Supp.App. 3a, underscores the court's conclusion that racially discriminatory decisions nonetheless satisfy constitutional muster when cloaked as putative efforts to comply with Title VII and EEOC Guidelines. This *non sequitur* has been expressly rejected by the Seventh Circuit:

> "How can that be? Then Congress or any federal agency could direct employers to adopt racial quotas, and the direction would be self-justifying: the need to comply with the law (or regulation) would be the compelling interest. Such a circular process would drain the equal protection clause of meaning." *Biondo* v. *City of Chicago*, 382 F.3d 680, 684 (CA7 2004), cert. denied, 543 U.S. 1152 (2005).

Circuits applying these principles to civil service testing cases have properly focused on the Constitution, not Title VII. In *Biondo*, the Seventh Circuit held that neither Title VII nor the Equal Protection Clause permit a city to respond to a promotional examination's disparate impact by employing dual eligibility lists. 382 F.3d, at 684; see Part III *infra*. Other courts of appeals have rejected similar rationales advanced to justify race-based preferences. See, *e.g.*, *Dean* v. *City of Shreveport*, 438 F.3d 448 (CA5 2006) (reversing dismissal of white firefighter applicants' equal protection claims where the record, beyond statistical evidence of racial disparities, did not establish a constitutionally permissible basis for denying them hire); *Quinn* v. *City of Boston*, 325 F.3d 18 (CA1 2003) (holding city officials violated the clause in refusing to hire top-scoring whites on entry-level firefighter exam); *Dallas Fire Fighters Assn.* v. *City of Dallas*, 150 F.3d 438 (CA5 1998) (finding promotion of women and minorities over higher-ranked white males violated the clause with no need to address validity under Title VII); *Md. Troopers Assn.* v. *Evans*, 993 F.2d 1072 (CA4 1993) (the clause forbids the state from classifying promotional candidates by race except as a narrowly tailored and last-resort remedy for intentional discrimination). The Second Circuit through this decision has deliberately put itself in conflict with these cases, necessitating review by the Court to secure national uniformity on this important constitutional question.

Respondents' admitted aim was not to remedy the effects of prior intentional race discrimination but merely to avoid the failure of valid promotional exams to yield racially proportional demographic results. Government employment practices with racially disparate impact do not violate the Constitution without racially discriminatory intent. *Washington* v. *Davis*, 426 U.S. 229, 242 (1976) ("We have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another."). Indeed, "[t]he Court has noted the danger that relying solely on statistical disparities as proof of discrimination under Title VII could result in the imposition of de facto quotas." *Lutheran Church-Missouri Synod* v. *FCC*, 154 F.3d 487, 494 (CADC 1998) (citing *Watson* v. *Fort Worth Bank & Trust*, 487 U.S. 977, 991-97 (1988) (plurality opinion)); see Part II.B *infra*. The Second Circuit not only falsely equates adverse impact with a statutory violation but mistakenly concludes that an imagined violation provides a constitutional basis for remedial measures, another notion rejected in the Seventh Circuit and elsewhere:

> "If avoiding disparate impact were a compelling governmental interest, then racial quotas in public employment would be the norm, and as a practical matter *Washington v. Davis* would be undone. Congress did not attempt this; to the contrary, it provided in 42 U.S.C. §2000e-2(j) that an employer's desire to mitigate or avoid disparate impact

> does *not* justify preferential treatment for any group." *Biondo*, 382 F.3d, at 684.

See, *e.g.*, *Lutheran Church-Missouri Synod*, 154 F.3d, at 494 (applying strict scrutiny to FCC equal-employment opportunity regulations challenged on equal protection grounds and stating that "in some situations unequal treatment is justified to account for past discrimination, but societal discrimination is not enough to justify imposing a racially classified remedy").

B. The Opinion Endorses Racial Balancing.

The Court has repeatedly admonished that "outright racial balancing" is unconstitutional. *Croson*, 488 U.S., at 507; *Grutter*, 539 U.S., at 330. The district court couched its support for respondents' efforts to ensure proportional representation in its consideration of ostensibly neutral ministerial acts: respondents' refusal to "validate" exams, "certify" eligible lists, or act on the results of "presumptively flawed" tests. To these euphemisms for racial balancing, the court of appeals added another: a city "simply trying to fulfill its obligations under Title VII."

But "[t]he principle that racial balancing is not permitted is one of substance, not semantics." *Parents*

Involved, 127 S.Ct., at 2758. Just as "[r]acial balancing is not transformed from 'patently unconstitutional' to a compelling state interest simply by relabeling it 'racial diversity,'" *ibid.*, neither does it mutate when styled as "voluntary compliance" with Title VII or a city's response to the "unfortunate position of having no good alternatives" to racially disproportionate test results. Supp.App. 2a. Among the many purposes of strict scrutiny is to "smoke out" instances of "racial politics" masquerading as remedial action. *Croson*, 488 U.S., at 493. Unchecked, racial classifications "can lead to corrosive discourse" and use of race "as a bargaining chip in the political process." *Parents Involved*, 127 S.Ct., at 2797 (Kennedy, J., concurring in part and concurring in the judgment). Indeed, in *Parents Involved*, the Court noted that the very rationale offered by officials in that case to justify racial balancing in public schools could logically extend to many other government arenas, including the civil service. 127 S.Ct., at 2779 (Thomas, J., concurring).

Other circuits, in contrast, have understood and properly applied these basic principles. In *Williams* v. *Consolidated City of Jacksonville*, 341 F.3d 1261 (CA11 2003), the Eleventh Circuit squarely held that the Equal Protection Clause does not permit city officials to refuse to fill existing vacancies because of the race of those in line for them on a civil service eligibility list. See also *Afro-Am. Patrolmen's League* v. *City of Atlanta*, 817 F.2d 719, 724 n.5 (CA11 1989) (noting disagreement with the contention that

because "no promotions were made when the test was abandoned, . . . therefore no rights of non-minority candidates were violated"). The court of appeals found *Williams* unpersuasive because, unlike the Jacksonville officials, respondents did not "certify" the lists. App. 40a n.10. But that is a distinction without a difference; it does not matter what mechanical means are employed to accomplish the same prohibited end.

Further, respondents' attempt to cloak their refusal to honor unbiased test results in Title VII garb cannot obscure that respondents reacted to racial disparity by denying petitioners earned promotions and setting aside the vacancies for those of a different race until respondents can devise a means to award them at least some of the positions. The proportionality respondents seek is nothing more than racial balancing, and it is patently unconstitutional.

C. The Opinion Permits Race Politics To Masquerade As Voluntary Title VII Compliance.

It invites mischief to relax established constitutional standards of scrutiny based on government actors' purported "voluntary compliance" with Title VII. At best, it forces well-meaning officials to navigate between discrimination's Scylla and reverse discrimination's Charybdis. At worst, it gives unscrupulous officials cover to yield to the demands of

organized racial lobbies, with Title VII as a convenient, unassailable pretext.

The city's unprecedented refusal to fill promotional vacancies as required by its charter took place in a politically and racially charged context. Board members faced not only organized pressure from the administration and the urgings of local legislators, but threats of "political ramifications" from a local power-broker, respondent Kimber, who also happened to be one of the fire commissioners charged with filling the vacancies from the eligible lists. App. 235a-236a, 305a-306a, 1032a.

This is a classic example of the "race politics" this Court warned might lurk behind racial classifications not held to the exacting strictures of the Equal Protection Clause. The court of appeals cast the crude politics in this case in frankly approving terms. Its ruling allows recalcitrant elected officials and others hostile to this Court's equal protection holdings to accomplish an equal results agenda *sub rosa*. The Second Circuit's approval will powerfully encourage other municipalities and states to pursue the same strategy. That should be prevented by the Court's correcting this deviation from the Constitution and the Court's jurisprudence and resolving the division in the circuits that it creates.

D. The Denial Of Certiorari In *Bushey* By A Divided Court Favors Review.

The Second Circuit's holding in *Bushey* drove respondents' conduct and the outcome of this litigation. See App. 37a-39a, 439a-445a. A sharply divided Supreme Court denied certiorari in *Bushey*. *Bushey* v. *N.Y. State Civil Serv. Comm'n*, 469 U.S. 1117 (1985). Then Justice Rehnquist, joined by Chief Justice Burger and Justice White, considered *Bushey* constitutionally suspect and its rationale "unpersuasive." *Id.*, at 1119-1121. In their view, the Second Circuit "reache[d] questionable conclusions on difficult and important questions." *Bushey* arose from nearly indistinguishable facts, including an admittedly political response to professionally developed job-related exams. See *id.*, at 1117-1118 (recounting New York's decision to normalize test results by race in response to statistical disparity and fear of a Title VII lawsuit by unsuccessful minority examinees). Justice Rehnquist, noting the absence of any evidence that New York had utilized civil-service tests to purposefully discriminate against minorities, observed that the state reacted to mere statistical disparity—and "at least in part because it fear[ed] a lawsuit by minority applicants"—by choosing to "discriminat[e] against similarly situated nonminority applicants." *Id.*, at 1120. Expressing concern that *Bushey* would permit public agencies to "claim that their actions [are] shielded under Title VII even if the actions would violate the Fourteenth Amendment," the very premise of the judgment in this case, Justice Rehnquist preferred to address the "difficult

questions" posed by the Circuit's approval of race-based measures to alter the outcome of a civil service examination. *Id.*, at 1121 That these important questions persist twenty-three years later, and now sharply divide the Second Circuit, demonstrates the need for this Court to grant the petition and resolve them. As noted, the Second Circuit's clear rejection of the contrary law in other circuits makes clear that this conflict will not resolve itself and can only be answered by the Court's intervention.

II. THE SECOND CIRCUIT'S INTERPRETATION OF TITLE VII CONFLICTS WITH THE STATUTE AND HOLDINGS OF THIS COURT AND OTHER CIRCUITS.

Title VII of the Civil Rights Act of 1964 makes it unlawful for employers "to fail or refuse to hire" or otherwise discriminate against an individual in the "terms, conditions, or privileges of employment because of such individual's race." 42 U.S.C. §2000e-2(a)(1). The "disparate impact" theory originated in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), in which this Court invalidated a private-sector employer's use of job-irrelevant criteria that largely disqualified African-Americans from employment. However, in the context of job-relevant employment criteria, unlawful disparate impact requires the availability of an equally valid alternative with less disparate impact, which the employer refuses to adopt. 42 U.S.C. §2000e-2(k); see *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 425 (1975). It is this refusal

that permits a court to infer unlawful action and indicates that the employer was using its tests merely as a pretext for discrimination. *Albemarle*, 422 U.S., at 425.

The decision in this case ignores this required framework for disparate-impact analysis and, as a result, wrongly allows employers to racially discriminate as a purportedly remedial response to statistical evidence of disparate impact without any basis for inferring unlawful discrimination from the underlying disparity. The Second Circuit simply refused to hold employers who use race-conscious means voluntarily to remedy perceived disparate-impact discrimination to the same high standard required for an employee to show an employment practice with a disparate impact is discriminatory. That refusal underscores the division between the Second Circuit and other circuits that do recognize the critical importance of evidence beyond statistical disparity before a court may infer unlawful discrimination.

A. The Second Circuit Wrongly Equates Adverse Impact With A Title VII Violation.

The court of appeals plainly considers a *prima facie* case or even mere statistical evidence of adverse impact sufficient to justify voluntary race-based measures by a public employer. The court based its conclusion on Second Circuit precedents, which

themselves suggest that something less than a *prima facie* case will do:

> "[A] showing of a *prima facie* case of employment discrimination through a statistical demonstration of disproportionate racial impact constitutes a sufficiently serious claim of discrimination to serve as a predicate for employer-initiated, voluntary race-conscious remedies . . . In other words, a *prima facie* case is one way that a race-conscious remedy is justified, *but it is not required*: all that is required is a sufficiently serious claim of discrimination to warrant such a remedy." App. 37a (emphasis added; quoting *Bushey* v. *N.Y. State Civil Serv. Comm'n*, 733 F.2d 220, 228 (CA2 1984), and *Kirkland* v. *N.Y. State Dept. of Corr. Servs.*, 711 F.2d 1117, 1130 (CA2 1983)).

This conclusion not only directly conflicts with this Court's holding in *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567, 576-579 (1978) (*prima facie* case does not equate with a finding of discrimination and "courts may not impose . . . a remedy [for racial imbalance] on an employer at least until a violation of Title VII has been proved"), but also with *Albemarle's* definition of adverse impact as but a first step in the discrimination analysis, 422 U.S., at 425. The incongruity is glaring, given that the court acknowledged petitioners' *prima facie* case of intentional discrimination under Title VII, in which the petitioners' race was clearly the motivating factor for the adverse employment action, yet declared a competing *prima*

facie case of *unintentional* disparate impact the summary winner without any evidence whatsoever that would permit an inference that the disparity was unlawfully discriminatory. Once again, the Second Circuit's analysis is out of step with the Court's and other circuits' jurisprudence and needs to be corrected through certiorari review.

B. The Second Circuit's Construction Of Title VII Vitiates The Disparate-Impact Framework And Evidentiary Standards Established By This Court.

Proof that an employer was presented with but refused to adopt an equally valid alternative test with less adverse impact is the *sine qua non* of Title VII liability. Respondents tried but failed to make that demonstration. Years after the Board vote, respondents merely advised the district court that they wished to "conduct studies" and "explore" for alternatives. This judicial bypassing of a core requirement contravenes both the Court's holdings and the express text of §2000e-2(k), which states that unlawful disparate impact is established *only if* the complaining party demonstrates that such an equally valid alternative with demonstrably less racially adverse impact was available and nonetheless rejected.

In rejecting petitioners' Title VII claims the Second Circuit cited its own view that respondents "had no good alternatives" to test results with racially disproportionate results. But if there are "no good

alternatives" to concededly job-related tests, Title VII cannot be violated by promotions in accordance with their results, and fear of Title VII suits cannot justify refusal to honor the results.

The Eleventh Circuit has clearly rejected the argument that adverse impact alone is a sufficient basis for abandoning results of content-valid employment exams. *Afro-Am. Patrolmen's League* v. *City of Atlanta*, 817 F.2d 719, 723-725 (CA11 1987).[13] The court held that without a demonstration of racial bias beyond mere statistical evidence of disparate impact "it would be impossible for the City to know which alternative—abandonment of the results or promotions based on the results—would be the racially neutral option." *Id.*, at 724.

The Second Circuit's improper equation of adverse impact and intentional discrimination permits employers to short-circuit this analysis and leapfrog from racial disparity to racial remedy. The opinion below characterized the exams as "presumptively flawed" based solely on their demographic results and thus justified respondents' refusal to consider the

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[13] The context of *Afro-American Patrolmen's League* differed from this case only in the source of the nondiscrimination requirement that was claimed to be violated—there, a consent decree from an earlier Title VII case requiring that "race shall play no part and shall be no criterion or factor" in promotion decisions. 817 F.2d, at 721-722, 723 n.4.

results without regard for whether the exams actually served their *purpose*—that is, accurately screened out the unqualified and distinguished among the qualified. App. 4a; see *Griggs*, 401 U.S., at 430 ("Congress did not intend by Title VII . . . to guarantee a job to every person regardless of qualifications."); *McCosh* v. *City of Grand Forks*, 628 F.2d 1058, 1063 (CA8 1980) (declining to second-guess reasonable job criteria for promotion to police sergeant given the risk to public safety of hiring the unqualified). Yet respondents conceded they discerned no flaws in the exams, were *not* contesting their validity, and were instead resting their entire defense on a "good faith" belief that they *might* someday discover equally valid alternatives to these valid tests. App. 1016a-1037a.

Respondents' refusal to honor the results of these tests, and their stated intent to continue to search for an alternative exam, were a superfluous and illegitimate response to circumstances from which no racial discrimination could legitimately be inferred. Without any valid basis for discerning unlawful discrimination from mere statistical disparity, the Second Circuit legitimated intentional racial discrimination against nonminorities as a "remedy" whenever an employment test displays racially disproportionate results. And going a step further, the Second Circuit suggests that, even if this is not the law, employers are "protected" from liability for having acted like it was.

If permitted to stand, the judgment will ineluctably lead to *de facto* racial quotas.[14] Twenty years ago, this Court addressed concerns that disparate-impact theory would lead to "perverse results," such as employer resort to disguised quotas and preferential treatment as a preferred alternative to litigation, and took particular note that in enacting §2000e-2(j) Congress "so clearly and emphatically expressed its intent that Title VII not lead to this result" that evidentiary standards were necessary to "serve as adequate safeguards" against it. *Watson* v. *Fort Worth Bank & Trust*, 487 U.S. 977, 992-993 (1988) (plurality opinion). The *Watson* plurality denied any license to employers "to adopt inappropriate prophylactic measures" to avoid disparate impact suits. "Allowing the evolution of disparate impact analysis to lead to this result would be contrary to Congress' clearly expressed intent, and it should not be the effect of our decision today." *Id.*, at 993.

Safeguards are even more crucial in the public sector. "Preferential treatment and the use of quotas by public employers subject to Title VII can violate the Constitution . . . and it has long been recognized that legal rules leaving any class of employers with

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[14] See Selmi, Was The Disparate Impact Theory A Mistake?, 53 UCLA L. Rev. 701, 742, 757-65 (2006) (noting most written examinations today still have substantial disparate impact and some governmental employers welcome disparate impact challenges to written examinations as a means to achieve "desired political goals" or respond to pressure for "diversity").

'little choice' but to adopt such measures would be 'far from the intent of Title VII.'" *Ibid.* (quoting *Albemarle*, 422 U.S., at 449).

Nevertheless, the Second Circuit declared that New Haven, with "no good alternatives" to a concededly valid promotional process, had no choice but to adopt a drastic and injurious measure, sanctioned by neither Title VII nor the Constitution: depriving unquestionably qualified officers of career advancement and leaving the command structure of a first-responder agency gutted until a greater number of minorities qualify for the positions. Worse yet, the Second Circuit endorsed the district court's suggestion that a government may elect such a course merely as a political expedient.

C. Divisions Among The Circuits In Applying The Disparate Impact Framework To Civil Service Testing Strongly Counsel Review By The Court.

The approach adopted by other circuits highlights the deep divide between the Second Circuit and other courts that have considered factually similar scenarios. In particular, the Seventh Circuit not only recognizes the demonstration of content-valid exam alternatives as an essential element of the framework, but has consistently held that conjecture, vague proposals and *ipse dixit* assertions regarding alternatives will not suffice and would "frustrate [the]

statutory scheme" of Title VII. *Allen* v. *City of Chicago*, 351 F.3d 306, 313 (CA7 2003); *Gillespie* v. *Wisconsin*, 771 F.2d 1035, 1044-1046 (CA7 1985). In a district beset by such claims, the Eighth Circuit likewise held those challenging job-related exams with disparate impact must meet this statutory burden in all respects. See *Stewart* v. *City of St. Louis*, 2007 WL 1557414 (ED Mo. May 25, 2007), aff'd *per curiam*, 532 F.3d 939 (CA8 2008). The Eleventh Circuit, too, has firmly required a demonstration of racial discrimination beyond simple reliance on statistical evidence of disparity before an employer may legitimately choose between two potentially discriminatory responses to disparate exam results. *Afro-Am. Patrolmen's League*, 817 F.2d, at 724. With civil service exams remaining a magnet for disparate impact claims, the plain need for a uniform interpretation and application of the Equal Protection Clause and Title VII's prohibition on discriminatory employment practices strongly counsels in favor of review.

III. Lower Courts Clearly Need Guidance In The Proper Application Of 42 U.S.C. §2000e-2(*l*).

As part of the 1991 amendments to Title VII, Congress, in plain terms, declared:

> "It shall be an unlawful employment practice for a respondent, in connection with the selection [of] . . . candidates for . . . promotion, to adjust the scores of, use different cutoff scores for, or otherwise alter the results of,

> employment related tests on the basis of race . . . . " 42 U.S.C. §2000e-2(*l*).

According to respondents, this provision eliminated any option other than refusing to honor the test results; they argued that *Dean, Quinn*, and other circuit decisions stand for the proposition that "courts do not look fondly upon cities' attempts to alter eligibility lists or alter the manner in which the lists are used" and thus "employers that find adverse impact in their tests should not certify the results." App. 947a; Appellee's Br. 79.

The ramifications of this untenable proposition are obvious—employers who are forbidden from tampering with test results based on race will be able to invalidate the results altogether for the same impermissible reason. The district court held §2000e-2(*l*) was not violated, absent use of "*different* cut-offs for different races or altering scores based on race." App. 38a n.9 (quotation omitted). The Second Circuit echoed respondents' argument that they had "no good alternatives." But in prohibiting employers from "otherwise alter[ing] the results" of tests for reasons of race, Congress did not intend to permit them simply to ignore or refuse to act on the results for the same reason.

The court's constriction of this provision sanctions the anomalous outcome: a "remedy" for race-based scoring disparities far more drastic and injurious to petitioners than "race-norming" the test results

would have been.[15] It is counterintuitive to suggest Congress intended the 1991 amendments to swell the ranks of those harmed by race-based measures. Equally implausible is the suggestion that public employers may so easily avoid §2000e-2(*l*). The court ignored the provision's third and much broader proscription on "otherwise alter[ing]" results. Far from being an aimless surplusage, the catch-all provision has an evident congressional purpose—to account for the myriad other means by which employers might accomplish the same prohibited ends as respondents did in this case.

The Fifth Circuit addressed §2000e-2(*l*) in *Dean* v. *City of Shreveport* and construed it to forbid all means that have the practical effect of prohibited acts. The court added that it would invalidate any such measures under Title VII even if they passed muster under the Equal Protection Clause as a permissible form of affirmative action. 438 F.3d, at 462-463. In contrast, the Seventh Circuit has refused to adopt a literal interpretation of §2000e-2(*l*). In *Biondo*, Judge Easterbrook suggested dispensing with rank-ordered promotions in favor of score "banding" and pooling candidates within a defined score spread as a means to lessen disparate impact. *Biondo*, 382 F.3d, at 684.

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[15] In *Bushey*, the Second Circuit approved race-norming of test results because it viewed resulting harm to nonminorities as tolerable since none were actually *displaced* from eligibility lists. See 733 F.2d, at 223.

Adopting score banding for the purpose of remedying an exam's disparate impact, it seems, would flout the proscriptions of §2000e-2(*l*). And it makes little legal or practical sense to interpret Title VII to displace state and local laws that, like New Haven's charter, mandate rank-ordered selections, particularly in the case of a public employer with a demonstrated history of abusing any increase in discretion to engage in intentional reverse discrimination and political horse-trading.[16] Indeed, it was respondents' alleged use of a similar device to discriminate against whites and favor the politically connected that led the Connecticut Supreme Court to condemn its adoption. *Kelly* v. *City of New Haven*, 881 A.2d 978, 1000-1004 (Conn. 2005). Finding that New Haven's rounding of scores and banding of candidates vitiated the rule-of-three and violated "the spirit and the letter" of the law, a unanimous Connecticut Supreme Court declared that permitting officials to select from among a large group risks blessing "a subterfuge for discrimination and favoritism, in contravention of the purpose of the civil service rules." *Ibid.* The record in *Kelly*, the court noted, included ample evidence in New Haven "of exactly the abuse of discretion based upon nepotism and racism that the civil service system is meant to prevent." *Id.*, at 1000 n.40.

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[16] The panel's conversion of its summary order to an opinion with full precedential force further imperils local laws mandating merit-based systems of hiring and promotions in civil service, laws which Congress did not intend to displace. See 42 U.S.C. §§2000e-2(h); 2000e-2(j); 2000e-7.

The lower courts construed §2000e-2(*l*) in a manner inconsistent with its text and evident purpose. The Fifth Circuit, on the other hand, has applied it strictly and suggested that measures like those adopted by respondents would violate §2000e-2(*l*). The Seventh Circuit has construed it as flexible enough to permit a practice that the Connecticut courts condemn as contrary to state interests and which, notably, New Haven voters rejected at the polls. Compare *Biondo*, 382 F.3d, at 684, with *Kelly*, 881 A.2d, at 1001 n.41. Given the significance of this provision to the many civil service tests which come under challenge, this Court should grant review to resolve these competing interpretations of a critical civil rights provision.

IV. Review Will Serve The Public Interest In Efficient And Competent Delivery Of Vital Services And Provide Needed Clarity For Local Officials.

The Second Circuit's flawed construction of Title VII and the Equal Protection Clause has serious ramifications for public safety and security. At unconscionable risk to public and firefighter safety, the command structure of a first-responder agency remained gutted while respondents purported to conduct studies and continue exploring for alternatives to perfectly legitimate civil service tests.

Petitioner Matthew Marcarelli scored first on the captain's exam. This could hardly have surprised

anyone. He has consistently scored at the top of the pack in every civil service exam he has taken, not because he is white, but because he has extraordinary credentials, education, and experience. App. 392a-401a. He was denied a well-deserved and justly earned promotion to captain, and the public was and is denied the benefit of his service in that leadership position. Also thwarted was the compelling public interest in treating Marcarelli fairly without regard to the color of his skin. The lower courts agreed with respondents' assertion that the issue of alternatives is "for another day," but neither the government's primary duty to protect the citizenry nor its duty to treat all people equally should be made to wait another day.

The field of emergency response has been taken to new technical and scientific heights. This case did not involve entry-level jobs or aptitude tests. As the job analyses, test syllabi, and the actual exams reveal, considerable scientific and tactical knowledge, skills, and abilities are needed to lead first responders whose own safety and that of others depends on it. If the district court were to have focused on any policy considerations, it was public and firefighter safety that should have been foremost, not the political interests of elected officials.

Promoting merit selection for public employment will improve government services and ensure fairness to those discriminated against, two compelling reasons to grant certiorari in this case. Another is to

provide clarity to officials caught between a rock and a hard place. The Seventh Circuit, for example, has observed that for thirty years the City of Chicago has been largely unable to administer civil service examinations for its public safety agencies without protracted litigation commenced either by unsuccessful examinees alleging disparate impact or the successful alleging their own rights were trammeled. See *Adams* v. *City of Chicago*, 469 F.3d 609, 610 (CA7 2006), cert. denied, 127 S.Ct. 2141 (2007). Rather than avoiding a similar path in this case, the Second Circuit embarked on it, deciding these important issues in a manner that guarantees states and municipalities will have to brace for litigation every time they administer a job-related examination, at great cost to the public and those who invested and sacrificed much in reliance on the promise of a merit-based system, only to be told their efforts were for naught because they are of the wrong race.

The persistent conflicts over proper application to the civil service of Title VII's and the Constitution's competing guarantees and prohibitions demonstrate the need for this Court's review. This case will allow the Court to settle these questions, giving clarity to officials charged with enforcing civil service laws, improving the delivery of essential services to the

public, and vindicating the rights of employees to equal treatment under the law.

Respectfully submitted,

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(5) (3)

Nos. 07-1428 & 08-328

Supreme Court, U.S.
FILED
NOV 13 2008
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

FRANK RICCI, *et al.*,

Petitioners,

v.

JOHN DESTEFANO, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Can a municipality—faced with employment test results that establish a prima facie case of Title VII discrimination and testimony that alternative tests exist—decline to certify the results if it has a good faith belief that certifying the test would violate Title VII; or must the employer prove that certification would violate Title VII before declining to certify the results?

2. Should this Court provide "guidance" to the lower courts on the meaning of 42 U.S.C. § 2000e-2(l), which prohibits the race norming of test results, where petitioners did not argue in the district court that the City had violated this provision; the lower courts did not render a holding on this question; and the courts of appeals are not in conflict?

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IN THE

Supreme Court of the United States

Nos. 07-1428 & 08-328

FRANK RICCI, *et al.*,

Petitioners,

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JOHN DESTEFANO, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

Respondent City of New Haven files this brief in opposition to the petitions for a writ of certiorari.

STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331. The Court of Appeals had jurisdiction under 28 U.S.C. § 1291. This Court has jurisdiction under 28 U.S.C. § 1254(1).[1]

[1] Petitioners filed two separate petitions for certiorari, on May 14, 2008, and September 8, 2008; petitioners have not taken a position on which petition is the operative one.

INTRODUCTION

In their two petitions and supplemental brief, petitioners use sweeping language and raise the specter of "quotas" and "race balancing." A close examination of the case, however, makes clear that certiorari should be denied.

The City of New Haven was confronted with employment test results that, if certified, would have established a prima facie case of Title VII discrimination against minority job applicants. The City also heard testimony that alternative, less discriminatory tests exist. The case presents the question whether the City's decision to decline to certify these test results, based on its good faith belief that certifying the results would violate Title VII, violates the rights of non-minority applicants.

Petitioners and the district court noted that the case was unique. Indeed, although certain members of the Second Circuit have suggested that certiorari should be granted, these judges also stated that the case presents an issue of "first impression ... in the nation." A fortiori, there is no circuit split on any relevant question. Nor is there sufficient lower court guidance on the "indisputably complex" questions that the case presents. And because petitioners waived certain arguments, the case presents a poor vehicle in which to consider the "difficult" questions in the first instance. This Court should deny the petitions.

STATEMENT

A. Legal Framework

As analyzed by the district court, the case involves the intersection of two Title VII frameworks: disparate impact and disparate treatment.

1. *Disparate impact.* Title VII makes it unlawful to employ a facially neutral selection procedure that has an adverse effect on members of one race as compared to members of another race. 42 U.S.C. § 2000e-2(a)(2); *see also Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975); *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971).

In order to prove a Title VII disparate impact violation, a plaintiff must first establish a prima facie case of disparate impact by "offer[ing] statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group." *Watson* v. *Forth Worth Bank & Trust*, 487 U.S. 977, 994 (1988). A plaintiff may attempt to establish a prima facie case in a number of ways, including by arguing that the selection procedure shows disparate impact under the EEOC Uniform Guidelines on Employee Selection Procedures. *Id.*; *see also* 29 C.F.R. pt. 1607 (Uniform Guidelines). Under the Uniform Guidelines, "[a] selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will be regarded by the Federal enforcement agencies as evidence of adverse impact[.]" 29 C.F.R. § 1607.4(D). Courts judge the "'significance' or 'substantiality' of numerical disparities on a case-by-case basis." *Watson*, 487 U.S. at 995 n.3 (citations omitted).

Once a plaintiff asserting a disparate impact claim establishes a prima facie case, an employer may rebut the prima facie case by "demonstrat[ing] that the challenged practice is job related for the position in question and consistent with business necessity[.]" 42 U.S.C. § 2000e-2(k)(1)(A)(i). If the defendant rebuts the prima facie case, the plaintiff can nonetheless estab-

lish a Title VII disparate impact violation by demonstrating an alternative employment practice that is available, equally valid, and less discriminatory and showing that the defendant refuses to adopt such alternative employment practice. *Id.* § 2000e-2(k)(1)(A)(ii); *see also Albemarle*, 422 U.S. at 425.

2. *Disparate treatment.* Title VII also makes it unlawful to "fail or refuse to hire ... any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race[.]" 42 U.S.C. § 2000e-2(a)(1). In disparate treatment cases, unlike disparate impact cases, the employment practice is not facially neutral. *See, e.g., International Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 335 n.15 (1977).

a. *Pretextual Discrimination.* In cases where a plaintiff alleges intentional discrimination and a court must decide whether "a legitimate *or* an illegitimate set of considerations led to the challenged decision,"[2] courts apply a framework that this Court adopted in *McDonnell Douglas Corporation* v. *Green*, 411 U.S. 792 (1973).

Under this framework, the plaintiff carries "the initial burden ... of establishing a prima facie case of racial discrimination." *McDonnell Douglas*, 411 U.S. at 802. The burden then shifts "to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection." *Id.* If the employer articulates

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[2] *Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 247 (1989) (emphasis in original) (describing framework that applies in *McDonnell Douglas* cases).

such a reason, then the burden shifts back to the plaintiff, who must "be afforded a fair opportunity to show that [the] stated reason for [the adverse employment action] was in fact pretext." *Id.* at 804. If the plaintiff can show pretext, he will have proved a Title VII pretextual discrimination claim. *Id.* at 807.

b. *Mixed motives.* Because the *McDonnell Douglas* framework operates on the binary assumption that *either* a legitimate *or* an illegitimate consideration motivated the employer, when the plaintiff alleges that an employer made "decisions based on a mixture of legitimate and illegitimate considerations," a different framework applies. *Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 241 (1989). In these cases, often called "mixed motives" cases, "once a plaintiff ... shows that [an impermissible factor] played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving that it would have made the same decision even if it had not allowed [the impermissible factor] to play such a role." *Id.* at 244-245.

B. Factual Background

1. In November and December 2003, the New Haven Fire Department administered written and oral examinations for promotion to Lieutenant and Captain. Pet. App. 6a-7a. White candidates passed both examinations at a much higher rate than minority candidates. In both cases, the pass rate for African American candidates was approximately half of the pass rate for white candidates. *Id.* at 27a; *see also id.* at 7a-8a. With seven Captain vacancies and ten Lieutenant vacancies, it appeared that at most two Hispanics would be promoted to Captain, no Hispanics would be promoted to

Lieutenant, and no African Americans would be promoted to either position. *Id.* at 8a, 28a.[3]

2. After an initial review of the test results, City officials became concerned about the disparate impact shown in the results; they therefore decided to put the issue before the New Haven Civil Service Board ("Board"). Pet. App. 477a. The Board held five hearings to determine whether to certify the examination results. *Id.* at 8a.

At the first hearing, the City's Corporation Counsel at the time, Thomas Ude, provided a letter to the Board explaining that Title VII "prohibits 'disparate impact' discrimination" (Pet. App. 440a) and that EEOC Guidelines regard "'a *selection rate* for any race, sex or ethnic group which is less than 4/5 (or 80%) of the rate for the group with the highest rate'" as "'evidence of adverse impact'" (*id.* at 441a (emphasis in original)). (The selection rate for African Americans on each test was about 50% of the selection rate for whites, far below the 80% under the Guidelines. *Id.* at 27a; *see also id.* at 7a-8a.) Without recommending a course of action, Ude also informed the Board that "voluntary compliance with Title VII is strongly encouraged and is the preferred means of achieving the non-discrimination goals of Title VII." *Id.* at 443a.

The Board heard testimony from a number of people, arguing both for and against certification. Pet. App. 11a-19a. Christopher Hornick, Ph.D., an organizational psychologist who runs a consulting business that

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[3] Under the City Charter's "Rule of Three," each open Captain and Lieutenant position had to be filled by one of the three eligible individuals with the highest scores on the exam. *Id.* at 7a.

designs promotional tests, testified that the results presented "relatively high adverse impact": "I'm a little surprised at how much adverse impact there is in these tests." *Id.* at 14a-15a. He said that his company designs tests that typically show "significantly and dramatically less adverse impact[.]" *Id.* at 14a. He also suggested that the City's heavy weighting of the written portion of the exam might have contributed to the adverse impact. *Id.* at 551a. Dr. Hornick noted that one alternative testing procedure consists of "an assessment center process," rather than a written and oral exam. *Id.* at 15a-16a; 556a-557a.[4]

The Board ultimately held a vote on whether to certify the results and voted 2-2. Pet. App. 19a. Because there was no majority, the City did not certify the results. *Id.*

3. Petitioners, seventeen white candidates and one Hispanic candidate, sued the City of New Haven and a number of individuals, alleging violations of, among other things, Title VII and the Equal Protection Clause. Pet. App. 5a-6a. The parties filed cross motions for summary judgment, and the district court granted summary judgment for respondents on all federal claims. *Id.* at 6a.

In analyzing the Title VII claim, the parties presented arguments under the burden-shifting framework of *McDonnell Douglas*,[5] and the court applied

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[4] *See also id.* at 485a (member of black firefighters union testifying that the city of Bridgeport, Connecticut reduced adverse impact in its firefighter promotion test by "chang[ing] the relative weights" of the written and oral portions of the test to place greater weight on the oral portion of the test).

[5] *See, e.g.*, Pls. Opp. to Mot. for S.J. 33-34.

that framework. Pet. App. 22a. On the first step, the court assumed, arguendo, that petitioners had established a prima facie case of discrimination. *Id.* at 25a. Respondents then proffered, as their legitimate, nondiscriminatory reason for not certifying the exams, that "they desired to comply with the letter and the spirit of Title VII." *Id.*

In evaluating respondents' proffered nondiscriminatory reason—that they were seeking to comply with Title VII—the district court turned to a second Title VII framework, the disparate impact framework. The district court noted, however, that this presented a novel application of the disparate impact framework:

> As plaintiffs point out, this case presents the opposite scenario of the usual challenge to an employment or promotional examination, as plaintiffs attack not the use of allegedly racially discriminatory exam results, but defendants' reason for their *refusal* to use the results.... Here, the roles of the parties are in essence reversed....

Pet. App. 25a-26a. In this "revers[e]" application of the disparate impact framework, the district court faced a question that does not arise in a typical disparate impact case: whether, before it can decline to certify test results, the City must *prove* that certification of the test would constitute a Title VII violation (i.e., prove a disparate impact Title VII violation against itself) or, rather, whether it could decline to certify based on its good faith belief that certification would violate Title VII.

The district court noted that "plaintiffs do not dispute that the results showed a racially adverse impact

on African-American candidates ... as judged by the EEOC Guidelines." Pet. App. 26a-27a. Thus, it was "necessarily undisputed that, had minority firefighters challenged the results of the examinations, the City would have been in a position of defending tests that, under applicable Guidelines, presumptively had a disparate racial impact." *Id.* at 27a. The district court also noted that respondents had presented evidence to support their good faith belief that less discriminatory alternatives to the exams existed. *Id.* at 32a-33a.

In this context—where certifying the test would result in a prima facie disparate impact violation, and where the City had a good faith belief that less discriminatory alternatives existed—the district court rejected the argument that the City must *prove* that certification would constitute a Title VII violation. "[I]t is not the case that defendants *must* certify a test where they cannot pinpoint its deficiency explaining its disparate impact ... simply because they have not yet formulated a better selection method." Pet. App. 34a (emphasis in original).[6]

The district court also rejected petitioners' equal protection claim, holding that petitioners could not show either a facial classification based on race or a fa-

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[6] The court also rejected petitioners' argument that the City was obligated to conduct a validity study regarding the job-relatedness of the exams, noting that "[t]he guidelines do not require or mandate a validity study where an employer decides *against* using a certain selection procedure that manifests [disparate] impact[.]" Pet. App. 32a (emphasis in original). Because the City did not complete a validity study, *see id.* at 29a, the exams were never validated.

cially neutral employment action applied in a discriminatory manner. Pet. App. 45a-46a.

4. On February 15, 2008, the Second Circuit affirmed the district court's opinion in a summary order. The court concluded that the Board "was simply trying to fulfill its obligations under Title VII when confronted with test results that had a disproportionate racial impact" and that respondents were not liable. Pet. App. 3a-4a. On June 9, 2008, the panel withdrew the order and issued a short per curiam opinion nearly identical to the original summary order. *See Ricci* v. *DeStefano*, 530 F.3d 87 (2d Cir. 2008) (*Ricci per curiam*).

5. The Second Circuit conducted a sua sponte poll, and, on June 12, 2008, denied rehearing en banc by a vote of 7 to 6. The court released a number of decisions concurring in, and dissenting from, the rehearing decision. *See Ricci* v. *DeStefano*, 530 F.3d 88 (2d Cir. 2008) (*Ricci en banc*).

Judge Cabranes, writing for the dissenting judges, noted that the appeal presented issues that were "indisputably complex," and that raised "questions of first impression in our Circuit—and indeed, in the nation[.]" 530 F.3d at 93-94. Judge Cabranes also questioned whether the *McDonnell Douglas* standard was the proper analytical framework; he stated that the mixed motives framework of *Price Waterhouse* might instead apply. *Id.* at 99.[7]

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[7] The dissenting judges also questioned whether it was appropriate for the circuit to decide this case with a per curiam opinion, affirming for the reasons stated by the district court, *see id.* at 94 (Cabranes, J.), and the judges debated when the circuit should

Judge Calabresi, concurring in the denial of rehearing, noted that a mixed motives analysis under *Price Waterhouse* was waived: "[t]he parties did not present a mixed motive argument to the district court or to the panel." *Ricci en banc*, 530 F.3d at 89. "It is the unavailability of mixed motive analysis that makes this case an especially undesirable one for elective review." *Id.* As Judge Calabresi explained: "[d]ifficult issues should be decided only when they must be decided, or when they are truly well presented. When they need not be decided ... it is wise to wait until they come up in a manner that helps, rather than hinders, clarity of thought." *Id.*

6. On May 14, 2008, petitioners filed a petition for writ of certiorari ("First Petition"), seeking review of the February 15 judgment. On August 21, 2008, petitioners filed a supplemental brief alerting the Court to the activity in the Second Circuit after the First Petition was filed. Petitioners included in this supplemental brief a footnote stating that "petitioners anticipate filing another petition directed to the June 9 judgment" of the Second Circuit. Supplemental Br. 2 n.2. On August 27, 2008, this Court directed respondents to file a response to the First Petition. And on September 8, 2008, petitioners filed a second petition for certiorari ("Second Petition"), seeking review of the Second Circuit's June 9 judgment. This Second Petition raises different questions for this Court's review, and reworks many of the arguments. This brief in opposition responds to both petitions.

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rehear a case en banc, *see id.* at 89 (Calabresi, J.); *id.* at 89-90 (Katzmann, J.); *id.* at 92 (Jacobs, C.J.).

REASONS FOR DENYING THE PETITIONS

This is a novel case that does not merit this Court's review. Petitioners have stated that the case has "no parallel in the case law." Pls. Opp. to Mot. for S.J. 34. Judge Cabranes has likewise stated that the case is not only "indisputably complex" but that it also raises questions of "first impression ... in the nation." *Ricci en banc*, 530 F.3d at 93-94. The Court should deny review of these difficult and unique questions, which do not implicate a circuit split, and arise with little to no lower court guidance.

The principal Title VII question that petitioners raise is whether an employer can decline to certify test results if it has a good faith belief that certifying the results would violate Title VII. There is no conflict of authority on this question. Indeed, petitioners, the district court, and the Second Circuit judges who advocated rehearing all acknowledged that the case was unique. And although certain judges on the Second Circuit suggested that a different Title VII framework should instead apply—a mixed motives analysis rather than the *McDonnell Douglas* framework—petitioners expressly rejected this argument.

The second Title VII question that petitioners raise is whether the City's actions violated a statutory provision that bars race norming of test results. This issue was not raised by petitioners in the district court and, therefore, was not the basis of a holding by the district court (or the Second Circuit). In any event, there is no need to provide "guidance" to the lower courts on an issue that has not divided the courts of appeals and that arises infrequently.

Petitioners also seek this Court's review of the Equal Protection Clause challenge to respondents' re-

fusal to certify the test results. The district court determined that this conduct was not a racial classification warranting strict scrutiny; petitioners assert that this determination is contrary to this Court's precedent and that of other circuit courts. Petitioners, however, fail to demonstrate any error in the court's decision, and the request for error correction would not merit review in any event. Apparently recognizing as much, petitioners focus most of their equal protection arguments on the question whether, under strict scrutiny, respondents' efforts to comply with Title VII can justify the refusal to certify the test results. That question, however, was not considered by the courts below and is not squarely before the Court.

I. THE CASE DOES NOT PRESENT ANY QUESTION UNDER TITLE VII THAT WARRANTS THIS COURT'S REVIEW

A. This Case Is Unique And There Is No Split Of Authority On Whether An Employer Needs To Prove A Title VII Violation Against Itself Before Declining To Certify Test Results

The primary Title VII question raised by petitioners—whether an employer can decline to certify test results if it has a good faith belief that certifying the test results would violate Title VII—is a novel one that does not implicate a circuit split. It does not warrant this Court's review.

1. The novelty of the Title VII question is due in part to the fact that the case involves a Title VII framework within a framework—specifically, a disparate impact question embedded within petitioners' disparate treatment claim.

In analyzing petitioners' disparate treatment claim, the district court applied the *McDonnell Douglas* burden-shifting test. Pet. App. 22a. Within that disparate

treatment framework, respondents proffered as the legitimate, non-discriminatory reason for their actions their good faith belief that certifying the test results would itself constitute a Title VII violation—namely, a disparate impact violation against minority firefighters. *Id.* at 25a. The district court assessed the legitimacy of the City's proffered reason using the disparate impact framework. *Id.* at 26a-34a.

Yet this embedded question—the application of the disparate impact framework within a reverse discrimination disparate treatment case—presented the opposite fact pattern of the typical disparate impact action. The novelty of this fact pattern was noted by petitioners and the district court, as well as by the Second Circuit judges who dissented from the denial of rehearing. *See* Pls. Opp. to Mot. for S.J. 34 (noting that "the court is presented with an odd sequence of events" and "[t]he facts of this case find no parallel in the case law"); Pet. App. 25a-26a; *Ricci en banc*, 530 F.3d at 95 (Cabranes, J.) ("The District Court recognized the exceptional circumstances presented by the case, noting that it 'presents the opposite scenario of the usual challenge to an employment or promotional examination[.]'"); *id.* at 100 (the case "required a 'reversal' of the usual roles").[8]

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[8] Petitioners attempt to argue that the Second Circuit's decision in *Bushey* v. *New York State Civil Service Commission*, 733 F.2d 220 (2d Cir. 1984), is similar to this case. In *Bushey*, however, the public employer adjusted the test scores based on race such that the percent of minorities who passed increased by fifty percent; this case involves no such race-based adjustments. And, even if *Bushey* is read as implicating similar issues, the twenty-four year gap between *Bushey* and this case makes clear that the issue in this case arises extremely rarely. Thus, the case cannot be said to present an issue of recurring importance that would war-

2. As the novelty of the case implies, there is no circuit split; petitioners attempt to manufacture a conflict, but the four cases they cite are inapposite.

Three of the four cases (two from the Seventh Circuit and one from the Eastern District of Missouri), were not even reverse discrimination cases: the cases involved minority workers challenging promotional tests and procedures as having a disparate impact and, therefore, involved straightforward applications of the disparate impact framework.[9] They therefore did not address the question presented here: whether a good faith belief that test certification would create a disparate impact violation is a legitimate justification, under the disparate treatment analysis, not to certify test results.

And the fourth case—the Eleventh Circuit's 1987 decision in *Afro-American Patrolmen's League* v. *City of Atlanta*, 817 F.2d 719 (11th Cir. 1987)—did not con-

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rant this Court's review. Similar facts are also not presented in *Williams* v. *Consolidated City of Jacksonville*, 341 F.3d 1261 (11th Cir. 2003), and *Biondo* v. *City of Chicago*, 382 F.3d 680 (7th Cir. 2004), which are repeatedly cited by petitioners. *See Williams*, 341 F.3d at 1264 (involving no Title VII question and no suggestion that the promotional test might be discriminatory); *Biondo*, 382 F.3d at 682-683 (involving the creation of racially segregated lists, and proportional promotions from each list). *See also infra* Part II.

[9] *See Stewart* v. *City of St. Louis*, No. 4:04cv00885, 2007 WL 1557414 (E.D. Mo. May 25, 2007), *aff'd per curiam*, 532 F.3d 939 (8th Cir. 2008) (denying minority firefighters' Title VII disparate impact claim); *Allen* v. *City of Chicago*, 351 F.3d 306 (7th Cir. 2003) (holding that minority police officers did not prove their disparate impact claim against the city); *Gillespie* v. *Wisconsin*, 771 F.2d 1035 (7th Cir. 1985) (denying Title VII disparate impact claim of minority employees).

strue Title VII at all. Rather, it interpreted a specific provision of a consent decree concerning test certification, addressing whether the City of Atlanta should be held in contempt for violating the consent decree's terms:

> Here, the City ... abandoned a procedure it had agreed to in the consent decree. The sole issue then is whether ... the City failed to fulfill its duties under the June 1980 consent decree. We hold that it did.

817 F.2d at 724 (footnote omitted).

3. In any event, the district court's resolution of this question was correct. Petitioners argue that, faced with test results that were prima facie discriminatory and testimony indicating that alternatives were available, the City was not permitted to take voluntary actions to comply with Title VII; rather, under petitioners' view, the City was obligated to *prove* that certifying the test results would constitute a Title VII violation—in effect, prove a discrimination case against itself—before declining to certify the results.

This Court, however, has repeatedly made clear that Title VII encourages voluntary remedial measures. *See, e.g., Johnson* v. *Transportation Agency, Santa Clara County, Ca.*, 480 U.S. 616, 640 (1987); *see also United Steelworkers of Am.* v. *Weber*, 443 U.S. 193, 204 (1979) (noting that "a law triggered by a Nation's concern over centuries of racial injustice" was "intended as a spur or catalyst to cause 'employers and unions to self-examine and to self-evaluate their employment practices'" (*citing Albemarle*, 422 U.S. at 418)).

In particular, in another context, the Court has stated that an employer need not prove a Title VII violation against itself before taking remedial actions and, indeed, has stated that remedial actions can be undertaken even when there is not a prima facie case of discrimination. *See, e.g., Johnson*, 480 U.S. at 630, 632;[10] *cf. Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267, 290 (1986) (O'Connor, J., concurring in part and concurring in the judgment) ("The imposition of a requirement that public employers make findings that they have engaged in illegal discrimination before they engage in affirmative action programs would severely undermine public employers' incentive to meet voluntarily their civil rights obligations."). This approach is "grounded in the recognition that voluntary employer action can play a crucial role in furthering Title VII's purpose of eliminating the effects of discrimination in the workplace, and that Title VII should not be read to thwart such efforts." *Johnson*, 480 U.S. at 630.

The consequence of petitioners' view is that conduct is discriminatory unless avoiding such conduct is itself discriminatory. This view allows for no flexibility and creates an "us versus them" legal regime. Yet Ti-

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[10] In both *Johnson* and *Weber*, the Court approved of voluntary affirmative action plans designed to "eliminate a manifest racial [or gender] imbalance" in a particular job category. *Weber*, 443 U.S. at 208; *see also Johnson*, 480 U.S. at 631-632. In *Johnson*, the Court stated that "[a] manifest imbalance need not be such that it would support a prima facie case against the employer" before the employer can institute a voluntary plan. 480 U.S. at 632. And citing what it characterized to be the holding of *Weber*, the *Johnson* Court stated that "an employer seeking to justify the adoption of a plan need not point ... even to evidence of an 'arguable violation' on its part." *Id.* at 630 (citing *Weber*, 443 U.S. at 212 (Blackmun, J. concurring)).

tle VII does not create this stark (and troubling) divide. Rather, as this Court's precedent indicates, there is a middle ground—in which an employer can take voluntary remedial measures that do not violate the rights of either whites or minorities. This case involves precisely this middle ground.[11]

B. The Question Of The Proper Analytical Framework In This Novel Context Was Not Litigated Below And Is Not Presented Here

If this Court were inclined to wade into this "indisputably complex" issue, the Court should await a vehicle in which the parties have litigated, and are seeking review of, the question of which analytical framework should apply. That is not the case here.

The district court applied a *McDonnell Douglas* burden-shifting analysis. Some members of the Second Circuit, as well as the amicus in this Court, suggested that the case should have been analyzed under the "mixed motives" framework of *Price Waterhouse*, rather than under the *McDonnell Douglas* burden-shifting framework. *See Ricci en banc*, 530 F.3d at 99-100 (Cabranes, J.); *see also id.* at 89 (Calabresi, J.); *id.* at 91 (Parker, J.); Center for Individual Rights Amicus Br. 8.

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[11] The practical consequences of petitioners' view also demonstrate why it is untenable. As petitioners would have it, even if a municipality has a good faith belief that less discriminatory tests exist, and that certification would violate Title VII, the municipality must nonetheless certify the test results. Yet it is unclear how the municipality would then defend against a Title VII action by minority employees and, in particular, how it would respond to interrogatories or requests for admission on these topics (*e.g.*, whether the municipality believes that alternatives exist and whether it believes that its act of certification violated Title VII).

The mixed motives framework, however, was expressly rejected by petitioners, was not passed on by the district court or the court of appeals below, and is not raised by petitioners in this Court. After both parties presented *McDonnell Douglas* arguments to the district court, the district court analyzed the petitioners' claims under *McDonnell Douglas*. *See, e.g.*, Pet. App. 22a; Pls. Opp. to Mot. for S.J. 33-34. Indeed, the *Price Waterhouse* framework was first raised by an amicus brief in the Second Circuit filed by the Center for Individual Rights ("CIR") (also amicus in this Court). *See* CIR 2d Cir. Amicus Br. 1, 7. And petitioners expressly disclaimed this framework. *See* Pls. 2d Cir. Reply Br. 20 n.17 ("Plaintiffs disagree insofar as CIR suggests defendants offered a non-discriminatory motive to mix with an alleged discriminatory motive[.]"). As noted by Judge Calabresi, the *Price Waterhouse* framework was therefore not available to the Second Circuit "for the most traditional of legal reasons. The parties did not present a mixed motive argument to the district court or to the panel." *Ricci en banc*, 530 F.3d at 89.[12]

If the Court were inclined to grant review in a case involving a fact pattern similar to the present one, it should do so in a case in which the question of the proper framework—*McDonnell Douglas*, *Price Water-*

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[12] Petitioners' argument that "mixed motives is an affirmative defense" such that respondents bore the burden of raising the issue (*see* Supp. Br. 6 n.5) is inapposite. *Price Waterhouse* itself suggests that a plaintiff need not label, but must plead, a mixed motives case from the outset even if it is alleged in the alternative. 490 U.S. at 247 n.12. And regardless of burdens, the obstacles to this Court's consideration remain—the issue has not been vetted by the lower courts and is not squarely presented here.

house, or some other approach—was litigated by the parties. *See Ricci en banc*, 530 F.3d at 89 (Calabresi, J.) ("It is the unavailability of mixed motive analysis that makes this case an especially undesirable one for elective review.").[13]

C. Petitioners Did Not Argue In the District Court That The City Violated The Title VII Provision Barring The Race Norming Of Test Scores And Lower Courts Are Not In Need Of "Guidance" On Its Application

In their second question presented in each petition, petitioners raise a separate Title VII question, stating that lower courts "clearly need guidance in the proper application of 42 U.S.C. § 2000e-2(l)." This provision, enacted in 1991, prohibits the race norming of test scores.[14] Yet petitioners did not raise this issue in the district court and, as a result, there is no relevant holding below. In any event, the issue does not warrant this Court's review.

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[13] The fact that all of the potentially relevant Title VII frameworks were not raised also affects whether the Court should grant review on the equal protection question. As a matter of constitutional avoidance, this Court should only reach the constitutional question after first resolving the Title VII question. *See Jean* v. *Nelson*, 472 U.S. 846, 854 (1985) ("Prior to reaching any constitutional questions, federal courts must consider nonconstitutional grounds for decision." (citations omitted)). The Court should therefore await a case in which the Title VII issues were fully litigated below.

[14] Specifically, the provision makes it unlawful for an employer to "adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(l).

Petitioners did not argue in the district court that the City had violated this provision. As the district court stated, "[w]hile plaintiffs are correct that Title VII now prohibits race-norming, *none is alleged to have happened here*[.]" Pet. App. 38a-39a n.9 (emphasis added). Petitioners cited this provision, but only to argue that it undermined certain Second Circuit authority on which respondents relied,[15] an argument that the district court rejected. *See id.* (stating that "the 1991 amendments do not affect the reasoning and holding of" the Second Circuit precedent). Thus, petitioners are flatly incorrect to make the remarkable assertion that "[t]he district court held § 2000e-2(l) was not violated." Second Pet. 36. The district court held no such thing.[16]

In any event, the courts of appeals are not in need of "guidance" on this question. The two circuit cases petitioners cite have similar holdings, and involved different facts from those at issue here. *See Dean* v. *City of Shreveport*, 438 F.3d 448, 462-463 (5th Cir. 2006) (holding that city violated "the plain language of section 2000e-2(l)" by "separating applicants' Civil Service Exam scores by race"); *Biondo* v. *City of Chicago*, 382 F.3d 680, 684 (7th Cir. 2004) (holding that the city's practice of creating racially segregated promotional lists was an equal protection violation, noting that "the

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[15] *See* Pls. Opp. to Mot. for S.J. 55, 59-60.

[16] Notwithstanding the district court's clear statement that no race norming "is alleged to have happened here," petitioners argue that the district court reached a holding on this question. To do so, petitioners excerpt from a parenthetical to a citation in the district court opinion. *See* Second Pet. 36 (excerpting the parenthetical the district court provided for its citation of *Hayden* v. *County of Nassau*, 180 F.3d 42 (2d Cir. 1999)).

dualist response to disparate impact" is also forbidden by Section 2000e-2(l), and stating in dicta that the creation of race-neutral score banding might be permissible).[17]

II. The District Court's Resolution Of Petitioners' Equal Protection Claim Does Not Warrant This Court's Review

Petitioners' Second Petition[18] raises the question whether respondents violated the Equal Protection Clause by refusing to certify test results that were prima facie discriminatory under Title VII and where potentially less discriminatory alternatives existed. Sounding the alarms of "quotas," "racial balancing," and "race politics," petitioners insist that review is necessary because this case creates a circuit split. An analysis of the issues in this case and the cases in the purported split, however, makes clear that petitioners merely seek error correction. To the extent that the petitioners seek consideration of other questions, they ignore substantial obstacles to review.

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[17] This Court should also deny review of the third Question Presented in the First Petition, which asks whether Title VII permits "federal courts to relieve municipalities from compliance with" local civil service laws. Petitioners do not separately discuss this question, and do not allege that there is a circuit split on this issue or that it is one of recurring importance. The Second Petition does not raise this question.

[18] The questions presented in the First Petition for a writ of certiorari do not mention the Equal Protection Clause or the United States Constitution more generally.

A. The District Court's Equal Protection Holding Was Limited To Whether Strict Scrutiny Applies

Reading petitioners' arguments, one would think that this case presents the question whether, under strict scrutiny, respondents could justify their refusal to certify the test results based on a compelling interest in complying with Title VII. Yet the district court's decision rested on its determination that the refusal to certify the test results was not a racial classification. Pet. App. 45a-46a. Accordingly, it did not consider whether the classification survives strict scrutiny, i.e., whether it was justified by a "compelling governmental interest" and "narrowly tailored to the achievement of that goal." *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986) (internal quotation marks and citations omitted).

On the predicate question, petitioners assert that the district court's refusal to apply strict scrutiny "is at odds with this Court's and other circuits' holdings." Second Pet. 16. Thus, in petitioners' own view, all they seek is error correction on the question whether strict scrutiny ought to apply. And it is far from clear that the district court erred in finding that the refusal to certify the test results for all applicants was not a racial classification.[19] Tellingly, the cases from this Court that petitioners cite do not address the question

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[19] Petitioners wrongly assert that because the district court "assumed petitioners suffered a race-based adverse employment action," it should not have concluded that the City did not create a racial classification (Second Pet. 18). In the district court's Title VII analysis, the court merely assumed without deciding that petitioners established a prima facie case of discrimination. *See* Pet. App. 25a. This, in turn, raises the question whether the Court would need to reach the Title VII questions that petitioners raise.

whether this case involves a racial classification, standing instead for the undisputed proposition that strict scrutiny ought to apply to racial classifications. *See* Second Pet. 16, 18-19.

The principal circuit court case that petitioners cite on this point (Second Pet. 17), *Williams* v. *Consolidated City of Jacksonville*, 341 F.3d 1261, 1269 (11th Cir. 2003), also does not demonstrate that the district court erred in this case. In *Williams*, the fire department used results from a test taken by applicants for captain positions to create an eligibility list from which promotions were to be made in rank order. 341 F.3d at 1264. Significantly, there had been no challenge to the test or any indication that it was flawed. *Id.* The fire department's director and chief considered creating four new captain positions and then decided not to do so because the four candidates at the top of the eligibility list were white men. *Id.* at 1265.

On these facts, the *Williams* court framed the question as whether "a decision not to *create* new positions that is based solely upon the race and gender of the next eligible candidates for promotion" constitutes a racial classification. 341 F.3d at 1269 (emphasis in original). And *Williams* determined that it was such a classification. *Id.*

By contrast, the issue in the present case is respondents' decision, with the same effects across the board, not to certify a test based on a good faith belief (premised on a prima facie violation) that certification would violate Title VII. Likening this case to *Williams* assumes away the critical features of this case. And petitioners cite no case establishing that comparable

efforts to comply with federal law constitute racial classifications.[20]

B. This Court's Review Is Not Warranted On The Question Whether The Refusal To Certify The Test Results Is Based On A Compelling Interest And Is Narrowly Tailored

Rather than focusing on their request for error correction, petitioners ask the Court to ignore the rationale of the decision below—that strict scrutiny did not apply—and jump directly to the question whether the refusal to certify the test results satisfies strict scrutiny. But even were the Court to approach the case this way, review is unwarranted, as petitioners' asserted circuit split does not exist.[21]

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[20] The other cases cited by petitioners do not involve classifications that are racially neutral on their face. For example, the case other than *Williams* that petitioners address at length, *Biondo* v. *City of Chicago*, 382 F.3d 680 (7th Cir. 2004), involved the creation of racially segregated employment lists and racially proportional hiring. *See infra* Part II.B.

[21] Petitioners are also incorrect to suggest that this Court's 1985 denial of the petition for certiorari in *Bushey* (469 U.S. 1117) warrants review of the equal protection issue in this case. *See* Second Pet. 26-27. First, the Second Circuit's decision in *Bushey* did not even address the Equal Protection Clause; it focused exclusively on Title VII. *See* 733 F.2d at 222. Second, even assuming that the cases raise similar questions, the apparent gap of more than two decades suggests the questions do not, in fact, have a wide-ranging impact. Third, this case involves very different remedial actions than in *Bushey* (where the public employer adjusted employment examination scores, thereby increasing the percentage of minorities who passed by fifty percent); indeed, the actions taken in *Bushey* are now prohibited by Title VII, *see* 42 U.S.C. § 2000e-2(l). Finally, the Court has already resolved one of the principal questions that then-Justice Rehnquist wanted to

In fact, the context and analysis of the case that petitioners rely on most heavily—*Biondo* v. *City of Chicago*, 382 F.3d 680 (7th Cir. 2004)—highlight the contrasts with this case. To start with, *Biondo* does not conflict with the decision below on the question whether compliance with statutes or regulations can justify certain employment actions for the simple reason that this question has not been addressed in this case. But even assuming the courts below had concluded that the non-certification of the test results was justified by a compelling government interest, that decision would implicate no conflict with *Biondo*.

In *Biondo*, the fire department created two racially segregated eligibility lists, one for whites and one for minorities, and made promotions on a proportional basis—the percentages of whites and minorities promoted matching the percentages of each group that had taken the test. 382 F.3d at 683. In assessing the equal protection implications of this conduct, the Seventh Circuit assumed that the federal regulations on which the department based its actions "tell employers not to hire or promote in strict sequence when that would cause minority groups to succeed less than 80% as often as whites." *Id.* at 684. Applying strict scrutiny, the court found that such a regulation could not provide a compelling interest to justify the proportional hiring from the racially segregated lists. *Id.*

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reach in *Bushey*. *Compare Bushey*, 469 U.S. 1119 (Rehnquist, J., dissent from denial of the petition for certiorari) (raising question whether the Second Circuit had properly extended this Court's holding in *Weber*, which dealt with voluntary affirmative action by *private* employers, "to allow voluntary affirmative action by *state* employers" (emphasis added)), *with Johnson*, 480 U.S. at 627 n.6, 641-642 (applying the reasoning of *Weber* to a state actor).

This case, however, involved a refusal to certify a test across the board, not proportional hiring off of racially segregated lists. And the noncertification was justified based on a concern that the test violated Title VII itself, not an effort to comply with a regulation that the court read to fix race-based limits on hiring decisions.

Williams likewise offers no evidence of a circuit split. As detailed above, the test underlying the eligibility lists in *Williams* was not challenged and there was no suggestion that the fire department chief and director was attempting to comply with Title VII, or any law or regulation, in declining to create the positions.[22]

Some of petitioners' arguments seem to suggest that, at bottom, they are seeking to raise the question

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[22] The other cases supposedly forming the split in authority are irrelevant to the issues at hand. None of these cases concerned the constitutional permissibility of refusing to certify a prima facie discriminatory test—indeed, though all the cases involved hiring decisions, none involved any potential challenges to the underlying test. And several of the cases focused heavily on the hiring process in the context of a consent decree related to prior discrimination, an issue not present in this case. *See Dean*, 438 F.3d 448 (race-based hiring lists, based in part on unchallenged tests, created in response to a consent decree relating to past discrimination); *Quinn* v. *City of Boston*, 325 F.3d 18 (1st Cir. 2003) (hiring preferences given to minority candidates with lower test scores on an unchallenged test, against a backdrop of a consent decree); *Maryland Troopers Ass'n* v. *Evans*, 993 F.2d 1072 (4th Cir. 1993) (challenge to a consent decree under which the state police agreed to hire set percentages of minority applicants at each state trooper rank); *see also Dallas Fire Fighters Ass'n* v. *City of Dallas*, 150 F.3d 438 (5th Cir. 1998) (hiring preferences given to minority candidates with lower test scores on a valid test).

whether compliance with Title VII's disparate impact requirements itself violates the Equal Protection Clause. *See* Second Pet. 24 (equating Title VII compliance with "proportionality" and "racial balancing," which it views as "patently unconstitutional"). But petitioners do not even attempt to argue that this question was addressed by the court below, must less that the court resolved the issue or that there is a circuit conflict. And even were the Court to find that this question warranted review, this would be a poor vehicle for such review. The Court would reach this question only if it first resolved the Title VII question against petitioners;[23] then held that the case involves a racial classification such that strict scrutiny applies; and then continued to the application of strict scrutiny (even though the lower courts did not proceed to this step in the analysis).[24] Accordingly, the Court ought not grant review in this case in order to address this question.

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[23] *See, e.g., Jean*, 472 U.S. at 854; *Ashwander* v. *Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J. concurring) ("[I]f a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter."); *see also supra* n.13.

[24] Additionally, the question of the conflict between Title VII and the Equal Protection Clause is not cleanly presented; as detailed above, the district court determined that respondents need not establish a Title VII violation before declining to certify the test results.

III. THE SECOND CIRCUIT'S DIVIDED DECISION ON REHEARING DOES NOT COUNSEL IN FAVOR OF THIS COURT'S REVIEW

Contrary to petitioners' arguments, the Second Circuit's divided decision on rehearing en banc does not counsel in favor of review. Indeed, the opinions make clear that lower courts have not yet weighed in on the issue. *Ricci en banc*, 530 F.3d at 93 (Cabranes, J.) (observing that case was one of "first impression" in the Second Circuit and "the nation"). By highlighting the "difficult[y]" and "indisputabl[e] complex[ity]" of the issues, *id.* at 94, 100, the decisions further confirm that any review in this Court should await development in the lower courts. And the repeated suggestions that a different analytical framework might apply reinforce the conclusion that review should await a case in which such other methods of analysis have not been rejected by the petitioners themselves. *See id.* at 89 (Calabresi, J.) ("It is the unavailability of mixed motive analysis that makes this case an especially undesirable one for elective review."); *see also id.* ("Difficult issues should be decided only when they must be decided, or when they are truly well presented. When they need not be decided ... it is wise to wait until they come up in a manner that helps, rather than hinders, clarity of thought.").[25]

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[25] In fact, much of the dispute in the Second Circuit was focused on whether rehearing was warranted because the Second Circuit panel had not authored a full opinion. *See id.*, 530 F.3d at 96 (Cabranes, J.) (criticizing the fact that the panel's "*per curiam* opinion adopted *in toto* the reasoning of the District Court, without further elaboration or substantive comment"). The lack of such an opinion, combined with the lack of precedent elsewhere, counsels against review before these issues are further developed in the lower courts. Moreover, it is unclear what precedential

CONCLUSION

This Court should deny the petitions for a writ of certiorari.

Respectfully submitted.

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NOVEMBER 2008

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value the Second Circuit itself will accord to the per curiam opinion.

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Nos. 07-1428, 08-328

Supreme Court, U.S.
FILED
NOV 24 2008
OFFICE OF THE CLERK

In The
Supreme Court of the United States

FRANK RICCI, ET AL.,

Petitioners,

v.

JOHN DESTEFANO, KAREN DUBOIS-WALTON, THOMAS UDE, JR., TINA BURGETT, BOISE KIMBER, MALCOLM WEBER, ZELMA TIRADO, AND CITY OF NEW HAVEN,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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INTRODUCTION

This case presents a well-defined and crucially important issue dividing lower courts: should employers be immunized for engaging in intentional discrimination by abandoning a valid, race-neutral promotion process because they claim to be voluntarily complying with Title VII, when that claim is supported only by statistical disparity. The Second Circuit has rejected the approach of other circuits, creating regionally conflicting constitutional and Title VII standards.

In asserting that there is insufficient lower-court guidance on the "indisputably complex" questions this case presents, respondents ignore that these issues have been brewing in the courts of appeals for three decades; indeed, many of them have addressed similar questions in the specific context of firefighter promotions. Moreover, the Second Circuit's decision has already begun to disrupt and deform employment-discrimination jurisprudence in the short time since it came down. Respondents' claim that petitioners' issues rarely arise ignores a weeks-old Sixth Circuit decision that considered the same questions and reached the same erroneous conclusions by specifically relying on the Second Circuit's decision.

This issue needs no further development in the lower courts. Lower courts need guidance, now, on whether purported Title VII compliance really is a free pass to throw out the results of race-neutral, content-valid tests. Governmental employers need guidance, too, on how to implement neutral promotion

processes to avoid both discrimination and "reverse" discrimination under Title VII and the Equal Protection Clause. The Court should grant certiorari.

ARGUMENT

I. The Court Should Decide Whether Racially Motivated Abandonment of a Valid, Race-Neutral Selection Process Violates Equal Protection.

Petitioners ask whether a government employer's refusal to follow a content-valid, race-neutral selection process violates the Equal Protection Clause when the cancellation is motivated by the race of the candidates selected for promotion.[1] Necessarily included in that question is whether that refusal is subject to strict scrutiny under the Equal Protection Clause. Respondents are wrong to pretend the two questions are radically separate. Indeed, it is well known strict scrutiny is virtually "automatically fatal," *Parents Involved in Cmty. Sch.* v. *Seattle Sch. Dist. No. 1*, 127 S.Ct. 2738, 2770 (2006) (Thomas, J., concurring), so the question of the appropriate analytical frame will be usually outcome-determinative.

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[1] Respondents seek to bury this question by omitting it from their rewritten questions presented and refusing to address it until their response's twenty-second page. They then feign confusion about its scope. BIO 22.

Nor is it merely error correction for this Court to consider whether race-motivated rejection of a merit-based race-neutral hiring process should be strictly scrutinized. BIO 23. The question is not simply whether the Second Circuit erred in applying an indisputably applicable analytical framework; it is whether its use of the wrong analytical lens resulted in an erroneous conclusion about liability.

The question about the proper legal standard to be applied is also important, well-defined, and well-prepared for review. The Second Circuit held strict scrutiny was not triggered when respondents refused to follow an already-established race-neutral promotion process because of the successful candidates' race, on the erroneous premise that the race-motivated refusal itself was race-neutral. That conclusion and reasoning conflict with a number of opinions holding that decisions just like New Haven's are racial classifications warranting strict scrutiny and that avoiding phantom Title VII liability is not a compelling interest justifying race-based governmental employment action. See First Pet. 32; Second Pet. 16-18.

Williams v. *Consolidated City of Jacksonville*, 341 F.3d 1261, 1269 (CA11 2003), like this case, involved a race-based decision not to promote based on the race of those who would have been promoted. See also *Afro-American Patrolmen's League* v. *City of Atlanta*, 817 F.2d 719, 724, n.5 (CA11 1989). Respondents' claimed difference between not creating the new positions in *Williams* and not filling existing positions in

this case has no analytical or constitutional relevance. As in *Williams*, respondents decided to abandon a race-neutral, content-valid promotion process, not because it was challenged, see BIO 27, but because they were concerned about the racial composition of the successful candidates. *Williams, supra,* at 1269. Moreover, *Williams* specifically pointed out that a "refus[al] to promote . . . to *preexisting* positions," would even *more* clearly violate equal protection. *Williams, supra,* at 1270-1271 (noting qualified immunity would have been denied on such facts). *Ricci* and *Williams* thus squarely conflict.

More generally, the Second Circuit's decision conflicts with multiple decisions holding that purported fear of Title VII liability cannot immunize discriminatory actions from constitutional strict scrutiny. *Dean* v. *City of Shreveport*, 438 F.3d 448, 454 (CA5 2006); *Biondo* v. *City of Chicago*, 382 F.3d 680, 684 (CA7 2004); *Quinn* v. *City of Boston*, 325 F.3d 18, 28 (CA1 2003); *Dallas Fire Fighters Assn.* v. *City of Dallas*, 150 F.3d 438, 440-441 (CA5 1998); *Md. Troopers Assn., Inc.* v. *Evans*, 993 F.2d 1072, 1076-1077 (CA4 1993). The First, Fourth, Fifth, and Seventh Circuits each strictly scrutinize race-based actions taken in purported compliance with Title VII and have regularly determined that such actions violate equal protection. Respondents' attempt to distinguish these decisions on irrelevant factual differences disregards the common legal framework in which each was decided, a framework the Second Circuit has rejected. It is not tolerable for similar practices to

be permitted, even lauded, in New Haven and New York while being constitutionally outlawed in Boston, Miami, and Chicago, and only this Court can resolve this tension and declare the uniform law of the land.

Respondents' ancillary arguments, such as the fact that some of the cases involved consent decrees, BIO 27, n.22, raise additional distinctions without a difference. The cases petitioners cite, like this case, are about remedial responses, under whatever rubric, to statistical adverse impact. These cases have regularly held that, when implementing a purportedly remedial response to racial imbalances in civil-service hiring processes, the desire to mitigate mere adverse impact against one group, without additional evidence of present discrimination, cannot justify intentional discrimination against another. *E.g.*, *Biondo, supra*, at 684; *Dallas Fire Fighters Assn., supra*, at 441; *Md. Troopers Assn., supra*, at 1076. The Second Circuit has held to the contrary.

Finally, respondents are mistaken in their odd contention that the avoidance canon somehow counsels against review. BIO 28 & n.23. Respondents pervert that canon into an argument that the Court should not take up the equal protection question because it may *find for the petitioners* on the Title VII question. Constitutional avoidance might counsel deciding the Title VII question before the equal protection question if the Court takes both, but it says nothing about whether the equal protection question is worth taking up in the first place.

Moreover, respondents miss the crucial point that this case is specifically and fundamentally about the interaction between Title VII and the Equal Protection Clause. The numerous cases addressing the interplay between purported desires to avoid adverse racial effects and the impermissibility of engaging in racial discrimination to do so indicate that this case presents a well-developed dispute that continues to vex local authorities. The Court should clarify how the statute and the Constitution interact.

II. The Court Should Grant Certiorari to Consider Petitioners' Title VII Question.

A. Petitioners Raise Well-Developed and Pervasively Recurring Title VII Issues.

The decision of the court of appeals short-circuits this Court's framework for Title VII disparate-impact analysis and endorses intentional racial discrimination as a purportedly remedial response to mere statistical evidence of adverse impact. Respondents strain unsuccessfully to obscure the widening divide separating the Second Circuit from other circuits considering factually similar scenarios, but this issue continues to arise with increasing regularity.

Multiple cases from at least three different circuits illustrate that the Second Circuit has departed from established Title VII analysis. In *Afro-American Patrolmen's League*, the Eleventh Circuit held that a civil-service employer must demonstrate unlawful discrimination beyond simple statistical

evidence of adverse impact before it can legitimately choose to discriminate against nonminority applicants or employees to avoid the impact of disparate exam results. 817 F.2d, at 724. Numerous decisions recognize that disparate-impact discrimination is established only by showing equally valid but less discriminatory exam alternatives, not by mere conjecture about their possible existence. See *Allen* v. *City of Chicago*, 351 F.3d 306, 313 (CA7 2003); *Gillespie* v. *Wisconsin*, 771 F.2d 1035, 1044-1046 (CA7 1985); see also *Stewart* v. *City of St. Louis*, No. 04-cv-885, 2007 WL 1557414 (ED Mo. May 25, 2007), aff'd *per curiam*, 532 F.3d 939 (CA8 2008).

Respondents unconvincingly claim that *Afro-American Patrolmen's League* is inapposite because it "did not construe Title VII" directly. BIO 15-16. They fail to acknowledge either that the consent decree in that case was entered to enforce Title VII guarantees or that its requirements were fully congruent with Title VII. *Afro-American Patrolmen's League, supra*, at 721. The case's central point, which flatly contradicts *Ricci*, is that without demonstrating racial bias beyond mere statistical evidence of adverse impact, the city could not "know which alternative—abandonment of the results or promotions based on the results—would be the racially neutral option." *Id.*, at 724.

Respondents are no more convincing with their question-begging distinction of *Allen*, *Gillespie*, and *Stewart* as "not even reverse discrimination cases." BIO 15. The Court has never said Title VII applies

differently depending on the plaintiffs' race. That is the very question presented, and the circuits' division cannot be obscured by merely assuming the answer.

Respondents are similarly mistaken in straining to paint petitioners' Title VII question as unique and rare. BIO 13-14. Most amazingly, they ignore that the Sixth Circuit, mere months after *Ricci*, relied extensively on *Ricci* as "factually analogous and persuasive authority" in upholding against Title VII challenge the cancellation of a merit-based selection process based on perceived disparate impact in promotional exam results. *Oakley* v. *City of Memphis*, No. 07-6274, 2008 WL 4144820, at *5 (CA6 Sept. 8, 2008) (unpublished).

Oakley, following *Ricci*, immunizes employers against claims of discrimination for abandoning a merit-based selection process, so long as the refusal is purportedly to avoid disparate impact—even when their fear of Title VII liability is potentially unwarranted and based solely on the EEOC's "four-fifths" guideline. See *id.*, at *4-*5. This conclusion erroneously ignores that disparate impact correctly only exists when there is adverse impact *and* no business-need justification. See 42 U.S.C. §2000e-2(k)(B)(ii); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 425 (1975). Thus *Oakley*, following *Ricci*, wrongly allows employers to reject race- and gender-neutral merit-selection processes whenever they do not achieve quotas.

Oakley, moreover, specifically endorses *Ricci*'s mistaken conclusion that there could be no discrimination because no one was promoted and the action

was thus supposedly neutral. *Oakley, supra*, at *4-*5. *Oakley*'s adoption of *Ricci*'s worst features and implications shows *Ricci* is and will continue to be misleading to other courts of appeals, causing disruption in the law. This is the proper case to end the disturbance.

B. The Court Should Decide Whether Intentional Discrimination Is Allowed to Remedy Unintended Disparate Impact.

The Second Circuit's (and respondents') broad definition of voluntary compliance with Title VII allows intentional racial discrimination for entirely prophylactic, nonremedial purposes to forestall perceived (and likely unprovable) future disparate impact. Respondents emphasize that Title VII encourages voluntary remedial measures. BIO 16-18. But Congress never authorized intentional racial discrimination as a voluntary remedial measure unless there is a compelling governmental interest for doing so. "[T]o the contrary, it provided in 42 U.S.C. §2000e-2(j) that an employer's desire to mitigate or avoid disparate impact does *not* justify preferential treatment for any group." *Biondo, supra*, at 684.

Further, the Court has severely restricted the circumstances that can justify intentional discrimination like that undertaken by respondents in this case. The Court has never suggested that intentional discrimination can be justified by mere concern or good-faith belief, based only on statistical disparity,

that an employment practice has disparate impact. See, *e.g.*, *Watson* v. *Fort Worth Bank & Trust*, 487 U.S. 977, 992-993 (1988) (plurality op.) (forbidding "inappropriate prophylactic measures" to avoid disparate impact suits). Instead, "[t]he Court has noted the danger that relying solely on statistical disparities as proof of discrimination under Title VII could result in the imposition of de facto quotas." *Lutheran Church-Missouri Synod* v. *FCC*, 154 F.3d 487, 494 (CADC 1998) (citing *Watson, supra*, at 991-997).

Yet the Second Circuit declared that statistically disparate results on concededly valid selection exams[2] allowed New Haven to abandon the promotional process specifically because of the successful candidates' race. The Second Circuit's improperly equating adverse impact with prohibited discrimination lets

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[2] Respondents conceded below that they discerned no flaws in the exams, were *not* contesting their validity, and were instead resting their defense on a "good faith" belief they *might* someday discover equally valid alternatives. App. 1016a-1037a. Respondents' new suggestion that they acted from validity concerns is disingenuous. Particularly so is their reliance on the equivocal comments of Dr. Hornick, a competitor to the exam developer, on a brief conference call with New Haven's civil service board about possible alternative exams. Hornick's comments were not based on a thorough review of the tests, App. 1030a, were not entitled to weight under relevant EEOC Guidelines, 29 CFR §1607.9(a) ("testimonial statements" from commercial providers are "[u]nacceptable substitutes for evidence of validity"), and in any event not entitled to be credited, since this case was resolved by summary judgment against petitioners and petitioners introduced ample contrary evidence of the tests' validity.

employers leapfrog from unintended disparity to intentionally discriminatory "remedy," shortcutting the proper analysis and violating Title VII (and the Equal Protection Clause).

Nor is petitioners' challenge to this erroneous analysis troubling, impractical, or unduly dualistic. BIO 17-18. Petitioners' position merely requires employers to look beyond purported good-faith[3] fear of Title VII liability and inquire specifically whether their employment tests are justified by business need. This is something every employer should be doing (and indeed New Haven did) before giving the tests in the first place.[4]

Voluntary employer action is important to further Title VII's purpose, but it does not permit employers to intentionally discriminate against nonminority employees simply because an employment test has racially disproportionate results. Rather, "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race." *Parents Involved*, *supra*,

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[3] Petitioners do not concede that respondents acted or that the district court found they had acted in good faith, either in their claimed fear of potential Title VII liability or in their asserted belief that intentional discrimination could be justified as voluntary Title VII compliance. There was ample contrary evidence, and this case was resolved on summary judgment against petitioners. App. 11a-14a, 16a-17a, 19a-20a, 51a.

[4] Moreover, New Haven commissioned a post-exam validation study and was aware that it would have validated the tests, but decided to block the study and scrap the promotions. App. 190a-191a, 329a-339a.

at 2768. The Second Circuit's endorsement of intentional racial discrimination based on mere statistical disparity contradicts this Court's cases, conflicts with other circuits' decisions, and confuses the jurisprudence of Title VII.

C. No Analytical-Framework Issue Impedes the Court's Review.

Respondents mistakenly suggest that the lack of lower-court "mixed-motive" analysis under *Price Waterhouse* v. *Hopkins*, 490 U.S. 228 (1989), makes this an imperfect vehicle. BIO 18-20. They rely heavily on Judge Calabresi's labors to shield this obviously suspect decision from review, but never actually explain why petitioners' questions cannot be reached. *Ibid.*

This is not a mixed-motives case. "The very premise of a mixed-motives case is that a legitimate reason was present." *Price Waterhouse, supra*, at 252. Respondents acknowledge they abandoned the promotion process because the successful candidates were largely white but equate this race-conscious act with legitimate, permissible voluntary compliance with Title VII. App. 24a-25a, 465a-476a; BIO 6-7, 16-17. But petitioners' core assertion is that this claimed excuse for respondents' discrimination against petitioners is not a legitimate one at all. *E.g.*, Supp. Br. 9, n.7. The issue is not choosing between legitimate and illegitimate justifications, but simply whether the justification offered by respondents is permissible

under Title VII and the Equal Protection Clause. The respondents' contention that this case is a poor vehicle is actually a disguised argument that the Court can *never* consider the petitioners' actual question.

III. Petitioners' 42 U.S.C. §2000e-2(*l*) Argument Was Properly Preserved and Deserves Review.

Respondents wrongly assert that petitioners "did not argue in the district court" that the City violated 42 U.S.C. §2000e-2(*l*). BIO 20-21 & n.16. But petitioners not only argued in their brief that the 1991 Title VII amendment invalidated *Bushey* v. *N.Y. State Civil Serv. Comm'n*, 733 F.2d 220 (CA2 1984), which respondents claimed to have followed, see Pls. Opp. to Mot. for S.J. 55, 59-60, but orally argued to the district court that Congress did not intend to allow employers to "end-run" the amendment's proscription against employer's racially motivated alteration of exam results by simply ignoring them. App. 1055a-1056a.

In suggesting the lower courts reached no holding on the issue, respondents also ignore their invocation of §2000e-2(*l*) in both lower courts as requiring their course of action. See Defs.' Opp. to Mot. for S.J. 12 (arguing based on the provision that "an employer's only choice when faced with an exam that results in adverse impact is to either accept or not accept the results."); Appellees' Br. 25 (similar). Petitioners squarely challenged this illogical construction

of the provision before the Circuit. See Appellants' Br. 66-68.

That both lower courts chose to reject petitioners' arguments by conflating them with respondents' self-favoring construction of §2000e-2(*l*) hardly sustains respondents' assertion that lower courts need no guidance on the issue.

CONCLUSION

The Court should grant certiorari.

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November 21, 2008

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No. 08-328

Supreme Court, U.S.
FILED
OCT 14 2008
OFFICE OF THE CLERK

In The

SUPREME COURT OF THE UNITED STATES

FRANK RICCI, *et al.*

Petitioners,

v.

JOHN DeSTEFANO, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

AMICUS BRIEF OF THE CENTER FOR INDIVIDUAL RIGHTS, THE CENTER FOR EQUAL OPPORTUNITY, AND THE AMERICAN CIVIL RIGHTS INSTITUTE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

For the purposes of Title VII and the Equal Protection Clause, does a state employer's refusal to take a required step for the hiring of a person because of that person's race constitute intentional racial discrimination if the refusal was based upon the employer's various concerns about the racial balance in the employer's work force?

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INTEREST OF AMICI CURIAE[1]

The Center for Individual Rights ("CIR") is a public interest law firm based in Washington, D.C. It has litigated many discrimination lawsuits, including several in this Court. It has a particular interest in, and has brought numerous cases concerning, what it views as unconstitutional racial classifications by government. *E.g.*, *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Grutter v. Bollinger*, 539 U.S. 306 (2003).

The Center for Equal Opportunity and the American Civil Rights Institute are nonprofit research, education, and public advocacy organizations. These *amici* devote significant time and resources to the study of the prevalence of racial, ethnic, and gender discrimination by the federal government, the several states, and private entities. They educate the American public about the prevalence of discrimination in American society, and publicly advocate the cessation of racial, ethnic, and gender discrimination by the federal government, the several states, and private entities. These *amici* also have participated as

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[1] This brief is filed with written statements from all parties that they either consent to, or do not oppose, the filing of this brief. Counsel of record for all parties received notice prior to the due date of these *amici curiae's* intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

amicus curiae in numerous United States Supreme Court cases relevant to the analysis of this case.

CIR filed an *amicus* brief in the Second Circuit. One of the arguments in that *amicus* brief – *viz.*, whether the district court erred by analyzing the evidence through the prism of the burden-shifting mechanism of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), rather than the mixed-motives analysis of *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1973) – was mentioned by a number of the Second Circuit judges after judgment was issued, in various decisions concurring with, and dissenting from, the decision to deny *en banc* rehearing. *Ricci v. DeStefano*, 530 F.3d 88, 91 (2d Cir. 2008) (Parker, J., concurring) ("As the dissent is well aware, the plaintiffs did not argue the mixed-motive theory; a non-party raised it in an amicus brief."); *id.* at 89 (Calabresi, J., concurring) (Judge Cabranes "would be precisely right [in arguing that the district court and the circuit panel should have considered whether defendants were influenced by mixed motives] . . . except for the fact that that type of analysis is not available to us in this case . . . [because] [t]he parties did not present a mixed motive argument.") (brackets and second ellipsis added); *id.* at 92 n.2 (Jacobs, J., dissenting) (rejecting the proposition that the court cannot consider matters not presented by the parties as "unsound"); *id.* at 100 (Cabranes, J., dissenting).

As shown below, while *amici* here believe that *Price Waterhouse* presents the correct paradigm for analyzing the facts here, it makes much less difference than the back-and-forth by the judges in the court below over the propriety of considering that argument might suggest.

STATEMENT

Amici adopt the recitation of facts in the petition. We add only this about the proceedings in the courts below.

Despite the brevity of its opinion, and its assertion that it was basing its conclusion on the rationale provided by the district court, the per curiam opinion of the circuit panel implied a rationale for affirming the judgment of the district court quite distinct from the one given by the district court itself. Specifically, the panel asserted that "the [New Haven Civil Service] Board . . . was simply trying to fulfill its obligations under Title VII when confronted with test results that had a disproportionate racial impact." *Ricci v. DeStefano*, 530 F.3d 87 (2d Cir. 2008); *see also Ricci v. DeStefano*, 530 F.3d at 90 (Parker, J., concurring) (stating that Second Circuit authorities stand for the proposition that "a public employer, faced with a *prima facie* case of disparate-impact liability under Title VII, does not violate Title VII or the Equal Protection Clause by taking facially neutral, albeit race-conscious, actions *to avoid such liability*") (emphasis added).

The panel's suggestion that compliance with Title VII was the *only* rationale (or even the primary one) for the decision of the New Haven Civil Service Board (the "Board") to refuse certification of the exam test results is simply not supported by the district court's opinion. That opinion freely admitted the existence of evidence of *other* motivations. *E.g.*, *Ricci v. DeStefano*, 554 F. Supp. 2d 142, 152 (D. Conn. 2006), *aff'd*, 530 F.3d 87 (2d Cir. 2008):

> Plaintiffs' evidence -- and defendants' own arguments -- show that the City's reasons for advocating non-certification were related to the racial distribution of the results. As the transcripts show, a number of witnesses at the CSB hearings, including Kimber, mentioned "diversity" as a compelling goal of the promotional process. Ude, Marcano, and Burgett specifically urged the CSB not to certify the results because, given the number of vacancies at that time, no African-Americans would be eligible for promotion to either Lieutenant or Captain, and no Latinos would be eligible for promotion to Captain. They believed this to be an undesirable outcome that could subject the City to Title VII litigation by minority firefighters, and the City's leadership to political consequences.

> Had the tests not yielded what defendants perceived as racially disparate results, defendants would not have advocated rejecting the tests, and plaintiffs would have had an opportunity to be promoted.

Id. at 162:

> [Defendants] acted based on the following concerns: that the test had a statistically adverse impact on African-American and Hispanic examinees; that promoting off of this list would undermine their goal of diversity in the Fire Department and would fail to develop managerial role models for aspiring firefighters; that it would subject the City to public criticism; and it would likely subject the City to Title VII lawsuits from minority applicants that, for political reasons, the City did not want to defend.

As petitioners' brief shows, these are somewhat euphemistic descriptions of defendants' concerns – especially on summary judgment, when the evidence is considered with all disputes and inferences favoring plaintiffs. But even accepting the district court's descriptions at face value, it did *not* suggest that the Board's *only* purpose was to avoid Title VII liability. *Ricci v. DeStefano*, 554 F.

Supp. 2d at 152 ("A jury could infer that the defendants were motivated by a concern that too many whites and not enough minorities would be promoted were the lists to be certified."). Rather, the district court held that these other motivations were irrelevant as a matter of law. *Id.* at 160 ("Defendants' motivation to avoid making promotions based on a test with a racially disparate impact, *even in a political context*, does not, *as a matter of law*, constitute discriminatory intent, and therefore such evidence is insufficient for plaintiffs to prevail on their Title VII claim"); *id.* at 162 (rejecting Equal Protection Clause claim because "[n]one of the defendants' expressed motives could suggest to a reasonable juror that defendants acted 'because of' animus against non-minority firefighters who took the . . . exams").

The gist of the district court's opinion, then, was that plaintiffs' evidence of defendants' desire to avoid a substantially white promotion cadre for political or other reasons simply did not prove intentional discrimination in violation of either Title VII or the Equal Protection Clause. In affirming the district court's judgment based upon "the reasons stated in the thorough, thoughtful, and well-reasoned opinion of the court below," *Ricci v. DeStefano*, 530 F.3d at 87, the circuit court adopted that reasoning. Any different reasoning suggested by the circuit court in its very short per curiam affirmance must be deemed *dicta*.

REASONS FOR GRANTING THE PETITION

The questions raised by fact patterns where employers are confronted with selection devices with disparate impacts are difficult ones. Under Title VII, a selection device that has disparate impact against any racial group could conceivably lead to liability if it is not justified by business necessity. On the other hand, permitting employers to refuse to hire applicants who were successful on the selection device because of their race when the employers have no real fear of any liability – that is, using the disparate impact of the selection device as a pretext to engage in a race-motivated refusal to hire – is the kind of discrimination that both Title VII and (for state employers) the Equal Protection Clause are meant to forbid.

The rule adopted by the courts below avoids all of the difficulties. It holds that an employer is *never* liable in this situation provided it does not use explicit racial classifications. That is, even where the employer has no real fear of any liability, it may engage in flagrantly race-motivated conduct to "remedy" any disparate impact, provided it does not use explicit racial classifications. None of it supposedly constitutes "intentional discrimination." This remarkable interpretation of both Title VII and the Equal Protection Clause creates a circuit split and deserves this Court's attention.

I. THIS CASE PRESENTS THE COURT WITH AN OPPORTUNITY TO CLARIFY WHAT REASONS FOR AN EMPLOYMENT DECISION CONSTITUTE "INTENTIONAL DISCRIMINATION" AND WHICH CONSTITUTE "LEGITIMATE" AND "NON-DISCRIMINATORY" REASONS

As the district court's own opinion demonstrates, there was evidence from which a reasonable juror could conclude that defendants were motivated by concerns other than potential compliance with, or liability under, Title VII. Thus, assuming that concern with Title VII liability was a legitimate and non-discriminatory reason for the action taken, this was a mixed-motives case, as in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). *Cf.* 42 U.S.C. § 2000e-2(m) ("an unlawful employment practice is established when the complaining party demonstrates that race . . . was a motivating factor for any employment practice, even though other factors also motivated the practice").

But although the district court should have used the *Price Waterhouse* burden-shifting mechanism, because race was a motivating factor in defendants' decision, the district court's ultimate determination was that *none* of the reasons proffered by plaintiff – all of which had nothing to do with avoiding Title VII liability – was sufficient to show intentional discrimination. Proving intentional discrimination is the ultimate

burden that a plaintiff must show under the *McDonnell Douglas* burden-shifting paradigm. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 508 (1993) (plaintiff retains ultimate burden of showing "that race was" the reason for the employment action). That is, had the court actually used the *Price Waterhouse* mechanism, it most likely would have (erroneously, in *amici*'s view) held that plaintiffs had not met their initial burden of showing that race was a motivating factor.

The ultimate question raised by the judgments of the court below, then, is whether the reasons attributed to defendants are sufficient to show that race was a motivating factor (as in *Price Waterhouse* or § 703(m)) and/or the reason (as in *St. Mary's Honor Center v. Hicks*) for defendants' actions. Conversely, one might ask whether the reasons attributed to defendants were "legitimate" and "non-discriminatory."

This Court has never defined in great detail what is needed for a reason to constitute "intentional discrimination," or, conversely, for a reason to be "legitimate" and/or "non-discriminatory." The plurality in *Price Waterhouse* stated that disparate treatment (*i.e.*, intentional discrimination) had been shown if a prohibited factor was made relevant to an employment decision. *Price Waterhouse*, 490 U.S. at 239 (plurality op.) ("In passing Title VII, Congress made the simple but momentous announcement

that sex, race, religion, and national origin are not relevant to the selection, evaluation, or compensation of employees"); *id.* at 240 (plurality op.) ("We take these words to mean that gender must be irrelevant to employment decisions"); *id.* at 242 ("We conclude . . . that Congress meant to obligate [a Title VII plaintiff] to prove that the employer relied upon sex-based considerations in coming to its decision"). The statute's use of the phrase "motivating factor" (in Section 703(m)) requires a similar conclusion.

A consideration does not avoid falling under the rubric of being "race-based" simply because there are non-racial consequences that would flow from hiring persons of a particular race – the loss of business from racists, co-employee dissatisfaction or departures, political consequences, etc. One analogy can be provided by the circuit courts' having generally rejected claims that "customer preference" constitutes legitimate business justifications, perhaps most famously in cases in which airlines tried to justify a preference for female flight attendants by claiming that their customers preferred them. *E.g.*, *Diaz v. Pan American World Airways, Inc.*, 442 F.2d 385, 387 (5th Cir. 1971) (sex was not a bona fide occupational qualification for flight attendant notwithstanding lower court's finding that passengers "overwhelmingly preferred to be served

by female stewardesses").[2]

Of course, in some sense, "customer preference" is a non-discriminatory rationale for an employer's action, since failing to adhere to "customer preferences" will lead to a decline in business. The loss of money – a substantial part of the motivation for avoiding a lawsuit under Title VII as well – surely can be seen as a legitimate and non-discriminatory business concern. But when the "customer preference" is for discrimination, an employer cannot rely on it as a legitimate and non-discriminatory business justification, regardless of the economic consequences.

Here, moreover, the district court found several reasons *aside* from concerns about liability under Title VII: defendants were concerned that hiring plaintiffs would "undermine their goal of diversity in the Fire Department"; "would fail to develop managerial role models for aspiring firefighters"; and "would subject the City to public criticism." *Ricci v. DeStefano*, 554 F. Supp. 2d at 162. But each of these concerns is directly related

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[2] *Diaz* actually considered whether sex was a bona fide occupational qualification. But that only demonstrates that there could be no dispute that "customer preference" was not a "non-discriminatory" reason for the defendants' policies of making employment decisions influenced by an employee's sex. The BFOQ inquiry is made only after a determination that the defendant has engaged in intentional discrimination.

to plaintiffs' race, and thus constitute racial considerations that would support a finding of intentional race discrimination.

Indeed, the first two of these rationales have been considered as possible compelling governmental interests (albeit in the educational context only). *Grutter v. Bollinger*, 539 U.S. 306 (2003) (diversity in higher education was a compelling governmental interest); *Wygant v. Jackson Bd. Of Education*, 476 U.S. 267, 276 (1986) (plurality opinion) (rejecting role model theory as compelling governmental interest for race-conscious school teacher layoffs). The important point here is that questions like "strict scrutiny" and "compelling governmental interest" are only reached *as a justification for intentional discrimination*. *E.g.*, *Wisconsin v. City of New York*, 517 U.S. 1, 18 n.8 (1996) ("Strict scrutiny of a classification affecting a protected class is properly invoked only where a plaintiff can show intentional discrimination by the Government"). And the third rationale (avoiding "public criticism") is nearly indistinguishable from the "customer preference" rationale discussed above.

II. THE RULE SET DOWN BY THE COURTS BELOW – THAT ALL "FACIALLY NEUTRAL" ACTION TO REMEDY A DISPARATE IMPACT IS NOT INTENTIONAL DISCRIMINATION – IS INCONSISTENT WITH THIS COURT'S JURISPRUDENCE, CREATES A CIRCUIT SPLIT, AND MAKES VERY LITTLE SENSE

The courts below avoided this problem – and the difficult problem of sifting through defendants' disparate motivations, which surely should have been addressed by the trier of fact at a trial – by declaring *all* of defendants' motivations legitimate and non-discriminatory. Specifically, they applied the following rule: "'nothing . . . precludes the use of race-neutral means to improve racial and gender representation . . . . [T]he intent to remedy the disparate impact of the prior exams is not equivalent to an intent to discriminate against non-minority applicants.'" *Ricci*, 554 F. Supp. 2d at 158-59 (*quoting Hayden v. County of Nassau*, 180 F.3d 42, 51 (2d Cir. 1999)). *Id.* at 160 (avoiding promotions from a test with disparate impact "does not, as a matter of law, constitute discriminatory intent").

By "race neutral," the courts below mean *only* actions that do not create explicit racial classifications. (Race must obviously be a motivation if one is trying to remedy a racially disparate impact.) *E.g.*, *Ricci v. DeStefano*, 530

F.3d at 90 (Parker, J., concurring) (referring to "facially neutral, albeit race-conscious" actions). But, if taken seriously, this means that defendants could have decided to only consider applicants with "even" list numbers (2, 4, 6, etc.) on the certification list if they concluded that that would increase the proportion of minorities in the pool of eligible applicants.

Similarly, were the Second Circuit's rule the law, colleges and professional schools would need worry no longer about inconvenient precedents like *Gratz v. Bollinger*, 539 U.S. 244 (2003) and *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). Instead of adding points for minority applicants (as in *Gratz*) or creating a special admissions program for them (as in *Bakke*), those institutions could simply add an irrelevant admissions criterion that they believed minorities would do well in – say the 50-yard backstroke. Since that would be a "facially neutral" albeit racially-motivated criteria, and it would improve the disparate impact resulting from the use of standardized admission tests (*see* 28 C.F.R. § 42.104(b)(2)), it would not even constitute "intentional discrimination." Most counterintuitively, then, the Second Circuit's rule would lead to the conclusion that such conduct could not possibly violate the Equal Protection Clause, since it requires intent. *Washington v. Davis*, 426 U.S. 229 (1976).

In analyzing this rule, it deserves emphasis

that most of the conduct prohibited under Title VII – firing, hiring, or promoting decisions motivated by race (or other prohibited factors) but without an explicit racial (or other) classification – falls under the Second Circuit's classification of "facially neutral." It is most odd, then, that what would obviously be "intentional discrimination" in most contexts, falls, in the context of ameliorating the disparate impact of selection devices, completely outside the rubric of "intentional discrimination."[3]

To put the point another way, the peculiar definition of "intentional discrimination" adopted by the courts below only applies if there is a selection device with disparate impact. If an employer takes "facially neutral" acts to manipulate the racial results of an employment process in *any other context* -- if, for example, the selection device does not have disparate impact but the employer is still dissatisfied with the racial results for reasons of public relations -- then those "facially neutral" acts are deemed a form of intentional discrimination.

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[3] In this regard, the courts below seemed to take comfort from the fact that "all applicants took the same test, and the result was the same for all because the test results were disregarded and nobody was promoted." *Ricci*, 554 F. Supp. 2d at 161. True enough – just as it is true that if two candidates are not hired, one because of her race and the other because she is not qualified, they are, in some sense, being treated the "same." But the first has been subjected to racial discrimination, and the second has not.

Further, the distinction between "explicit racial classifications" and "facially neutral but race motivated" decisions is one that may depend upon how the employer chooses to characterize its actions, rather than any important difference in substance. If the employer announces that it will hire those with list numbers divisible by five, and the reason it is doing so is to have three whites and two non-whites hired, that is a "facially neutral but race-motivated" remedy to disparate impact. If it announces that it will hire the top three scoring whites and the top two scoring non-whites, then it presumably has created an explicit racial classification.

The courts below misconstrued the "intent" requirement of the Equal Protection Clause and Title VII because they equated it with either (a) an express racial classification or (b) some kind of malevolent motivation against whites. Just after listing the defendants' various motives – including the goal of "diversity in the Fire Department" and avoiding "public criticism" – the district court held that "*[n]one* of the defendants' expressed motives could suggest to a reasonable juror that defendants acted 'because of' animus against non-minority firefighters who took the Lieutenant and Captain exams." *Ricci*, 554 F. Supp. 2d at 162 (emphasis added). This interpretation of "animus" is contrary to the interpretation this Court has given that word in Title VII and other civil rights laws. *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 269-70 (1993):

> We do not think that the "animus" requirement [in Section 1985(3)] can be met only by maliciously motivated, as opposed to assertedly benign (though objectively invidious), discrimination against women. It does demand, however, at least a purpose that focuses upon women *by reason of their sex* – for example (to use an illustration of assertedly benign discrimination), the purpose of "saving" women *because they are women* from a combative, aggressive profession such as the practice of law. (emphasis in original)

Cf. Int'l Union, United Automobile, Aerospace & Agricultural Implement Workers Of America v. Johnson Controls, Inc., 499 U.S. 187, 199 (1991) (policy of excluding women capable of becoming pregnant from jobs involving exposure to lead violated Title VII; "the absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect. Whether an employment practice involves disparate treatment through explicit facial discrimination does not depend on why the employer discriminates but rather on the explicit terms of the discrimination"); *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 668 (1987) (Section 1981 liability found against unions for failing to pursue claims of racial discrimination on the part of their members even though "there was no suggestion

below that the [u]nions held any racial animus against or denigrated blacks generally"); *id.* at 669 (affirming lower court finding that a union is liable under Section 1981 "regardless of whether . . . its leaders were favorably disposed toward minorities"). *Cf. Bakke*, 438 U.S. at 307 (opinion of Powell, J.):

> If petitioner's purpose is to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin, such a preferential purpose must be rejected not as insubstantial but as facially invalid. Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids.

The Second Circuit's requirement that the Equal Protection Clause requires this kind of "animus" also creates a circuit split with the Tenth Circuit. *Colorado Christian University v. Weaver*, 534 F.3d 1245, 1260 (10th Cir. 2008) (McConnell, J.) (holding that scholarship program for students attending any accredited college in the state, where state refused to give scholarships to students attending certain schools deemed "pervasively sectarian," violated the Equal Protection Clause):

> Finally, the state defendants argue

> that they may discriminate in favor of some religions and against others so long as their discrimination is not based on "animus" against religion – by which they mean religious "bigotry" . . . There is no support for this in any Supreme Court decision, or any of the historical materials bearing on our heritage of religious liberty. Even in the context of race, where the nondiscrimination norm is most vigilantly enforced, the Court has never required proof of discriminatory animus, hatred, or bigotry. The "intent to discriminate" forbidden under the Equal Protection Clause is merely the intent to treat differently.

By requiring either an explicit racial classification or a malevolent motive as a prerequisite to a finding of "intentional discrimination," the Second Circuit created an aberrational rule out of step with this Court's and other circuits' case law. It deserves the review of this Court.

CONCLUSION

For the foregoing reasons, the petition should be granted.

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Nos. 07-1428, 08-328

Supreme Court, U.S.
FILED
FEB 19 2009
OFFICE OF THE CLERK

In The Supreme Court of the United States

FRANK RICCI, ET AL.,

Petitioners,

v.

JOHN DESTEFANO, KAREN DUBOIS-WALTON, THOMAS UDE, JR., TINA BURGETT, BOISE KIMBER, MALCOLM WEBER, ZELMA TIRADO, and CITY OF NEW HAVEN,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Second Circuit

JOINT APPENDIX

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Petition for Certiorari Filed May 14, 2008
Petition for Certiorari Filed September 8, 2008
Certiorari Granted January 9, 2009

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OPINIONS, JUDGMENTS AND ORDERS CONTAINED IN THE PETITION APPENDIX

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September 29, 2006 Judgment of The District Court.....52a

February 15, 2008 Order and Judgment of the Court of Appeals for the Second Circuit.....1a

RELEVANT DOCKET ENTRIES

United States District Court for the District of Connecticut (New Haven)
CIVIL DOCKET FOR CASE #: 3:04-cv-01109-JBA

Ricci et al v. DeStefano et al

* * *

Date Filed	#	Docket Text
07/08/2004	1	COMPLAINT against Tina Burgett, John DeStefano, Karen Dubois – Walton, Boise Kimber, City of New Haven, Zelma Tirado, Thomas Ude Jr., Malcolm Weber (Filing fee $ 150 receipt number N012896.), filed by Michael Blatchley, Greg Boivin, Gary Carbone, Michael Christoforo, Ryan Divito, Steven Durand, William Gambardella, Brian Jooss, James Kottage, Matthew Marcarelli, Thomas J. Michaels, Christopher Parker, Sean Patton, Frank Ricci, Edward Riordon, Kevin Roxbee, Timothy Scanlon, Benjamin Vargas, John Vendetto, Mark Vendetto.(Rodko, B.) (Entered: 07/12/2004)
		* * *
10/01/2004	8	ANSWER and Affirmative Defenses to Complaint by Tina Burgett, John DeStefano, Karen Dubois – Walton, Boise Kimber, City of New Haven, Zelma Tirado, Thomas Ude Jr., Malcolm Weber.(Brown, S.) (Entered: 10/04/2004)

* * *

03/30/2005 26 MOTION for Leave to File Amended Complaint by Michael Christoforo, Ryan Divito, Steven Durand, William Gambardella, Brian Jooss, James Kottage, Matthew Marcarelli, Thomas J. Michaels, Sean Patton, Christopher Parker, Frank Ricci, Edward Riordan, Kevin Roxbee, Timothy Scanlon, Benjamin Vargas, John Vendetto, Mark Vendetto, Michael Blatchley, Greg Boivin, Gary Carbone. (Attachments: #1 Amended Complaint)(Malone, P.) (Entered: 04/01/2005)

* * *

05/26/2005 29 AMENDED COMPLAINT against John DeStefano, Karen Dubois-Walton, Thomas Ude, Jr, Tina Burgett, Boise Kimber, Malcolm Weber, Zelma Tirado, City of New Haven, filed by Michael Christoforo, Ryan Divito, Steven Durand, William Gambardella, Brian Jooss, James Kottage, Matthew Marcarelli, Thomas J. Michaels, Sean Patton, Christopher Parker, Frank Ricci, Edward Riordon, Kevin Roxbee, Timothy Scanlon, Benjamin Vargas, John Vendetta, Mark Vendetta, Michael Blatchley, Greg Boivin, Gary Carbone.(Malone, P.) (Entered: 05/27/2005)

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08/29/2005	48	*DEFENDANT'S* ANSWER to Amended Complaint with AFFIRMATIVE DEFENSES by John DeStefano, Karen Dubois-Walton, Thomas Ude, Jr, Tina Burgett, Boise Kimber, Malcolm Weber, Zelma Tirado, City of New Haven.(Roberts, Richard) (Entered: 08/29/2005)

* * *

11/04/2005	52	First MOTION for Summary Judgment by John DeStefano, Karen Dubois-Walton, Thomas Ude, Jr, Tina Burgett, Boise Kimber, Malcolm Weber, Zelma Tirado, City of New Haven.Responses due by 11/25/2005 (Attachments: # 1 Memorandum in Support # 2 Memorandum in Support # 3 Appendix # 4 Appendix)(Roberts, Richard) (Entered: 11/04/2005)
11/04/2005	53	Statement of Material Facts re 52 First MOTION for Summary Judgment filed by John DeStefano, Karen Dubois-Walton, Thomas Ude, Jr, Tina Burgett, Boise Kimber, Malcolm Weber, Zelma Tirado, City of New Haven. (Attachments: # 1 Exhibit # 2 Exhibit # 3 Exhibit # 4 Exhibit # 5 Exhibit # 6 Exhibit # 7 Exhibit # 8 Exhibit # 9 Exhibit # 10 Exhibit # 11 Exhibit # 12 Exhibit # 13 Exhibit # 14 Exhibit # 15 Exhibit # 16 Exhibit # 17 Exhibit # 18 Exhibit # 19 Exhibit)(Roberts, Richard) (Entered: 11/04/2005)

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12/19/2005	60	MOTION for Summary Judgment by Michael Christoforo, Ryan Divito, Steven Durand, William Gambardella, Brian Jooss, James Kottage, Matthew Marcarelli, Thomas J. Michaels, Sean Patton, Christopher Parker, Frank Ricci, Edward Riordon, Kevin Roxbee, Timothy Scanlon, Benjamin Vargas, John Vendetto, Mark Vendetto, Michael Blatchley, Greg Boivin, Gary Carbone.Responses due by 1/9/2006 (Attachments: # 1 Statement of Material Facts # 2 Statement of Material Facts Response to defendants' statement)(Torre, Karen) (Entered: 12/19/2005)
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01/06/2006 72 Statement of Material Facts re 71 MOTION to Amend/Correct 61 Statement of Material Facts, *Proposed Revised Statement of Material Facts* filed by Michael Christoforo, Ryan Divito, Steven Durand, William Gambardella, Brian Jooss, James Kottage, Matthew Marcarelli, Thomas J. Michaels, Sean Patton, Christopher Parker, Frank Ricci, Edward Riordon, Kevin Roxbee, Timothy Scanlon, Benjamin Vargas, John Vendetta Mark Vendetto, Michael Blatchley, Greg Boivin, Gary Carbone. (Torre, Karen) (Entered: 01/06/2006)

* * *

01/11/2006 75 ORDER granting 74 Motion to Seal Volume III, Volume VI and Exhibit 43 of Volume I of 62 Exhibits. Signed by Judge Mark R. Kravitz on 1/10/06. (Inferrera, L.) (Entered: 01/13/2006)

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02/03/2006	79	Statement of Material Facts re 60 MOTION for Summary Judgment filed by Steven Durand, William Gambardella, Brian Jooss, James Kottage, Matthew Marcarelli, Thomas J. Michaels, Sean Patton, Christopher Parker, Frank Ricci, Edward Riordon, Kevin Roxbee, Timothy Scanlon, Benjamin Vargas, John Vendetto, Mark Vendetto. (Torre, Karen) (Entered: 02/03/2006)
02/03/2006	80	Statement of Material Facts re 60 MOTION for Summary Judgment, 52 First MOTION for Summary Judgment filed by Michael Christoforo, Ryan Divito, Steven Durand, William Gambardella, Brian Jooss, James Kottage, Matthew Marcarelli, Thomas J. Michaels, Sean Patton, Christopher Parker, Frank Ricci, Edward Riordon, Kevin Roxbee, Timothy Scanlon, Benjamin Vargas, John Vendetto, Mark Vendetto, Michael Blatchley, Greg Boivin, Gary Carbone. (Torre, Karen) (Entered: 02/03/2006)
02/06/2006	81	Memorandum in Opposition re 52 First MOTION for Summary Judgment filed by Michael Christoforo, Ryan Divito, Steven Durand, William Gambardella, Brian Jooss, James Kottage, Matthew Marcarelli, Thomas J. Michaels, Sean Patton, Christopher Parker, Frank

Ricci, Edward Riordon, Kevin Roxbee, Timothy Scanlon, Benjamin Vargas, John Vendetto, Mark Vendetto, Michael Blatchley, Greg Boivin, Gary Carbone. (Torre, Karen) (Entered: 02/06/2006)

* * *

03/10/2006 89 RESPONSE re 80 Statement of Material Facts, 60 Motion for Summary Judgement filed by John DeStefano, Karen Dubois-Walton, Thomas Ude, Jr, Tina Burgett, Boise Kimber, Malcolm Weber, Zelma Tirado, City of New Haven. (Roberts, Richard) Modified on 3/13/2006 To create link to Motion # 60 (Malone, P.). (Entered: 03/10/2006)

03/10/2006 90 RESPONSE re 81 Memorandum in Opposition to Motion„ 52 First MOTION for Summary Judgment *pages 1-25 &Table of Contents* filed by John DeStefano, Karen Dubois-Walton, Thomas Ude, Jr, Tina Burgett, Boise Kimber, Malcolm Weber, Zelma Tirado, City of New Haven. (Attachments: # 1 pages 26-51# 2 Exhibit 1# 3 Exhibit 2# 4 Exhibit 3# 5 Exhibit 4# 6 Exhibit 5)(Roberts, Richard) (Entered: 03/10/2006)

* * *

06/16/2006 114 Amended RESPONSE re 60 MOTION for Summary Judgment, 52

First MOTION for Summary Judgment, 80 Statement of Material Facts, filed by John DeStefano, Karen Dubois-Walton, Thomas Ude, Jr, Tina Burgett, Boise Kimber, Malcolm Weber, Zelma Tirado, City of New Haven. (Attachments: # 1 pages 26-50# 2 pages 51-71# 3 Exhibit 1# 4 Exhibit 2# 5 Exhibit 3# 6 Exhibit 4# 7 Exhibit 5# 8 Exhibit 6# 9 Exhibit 7# 10 Exhibit 8# 11 Exhibit 9# 12 Exhibit 10# 13 Exhibit 11# 14 Exhibit 12# 15 Exhibit 13# 16 Exhibit 14# 17 Exhibit 15# 18 Exhibit 16# 19 Exhibit 17# 20 Exhibit 18# 21 Exhibit 19)(Roberts, Richard) (Entered: 06/16/2006)

* * *

07/13/2006 120 EXHIBIT Notice of Manual Filing of Exhibits VII and VIII by Michael Christoforo, Ryan Divito, Steven Durand, William Gambardella, Brian Jooss, James Kottage, Matthew Marcarelli, Thomas J. Michaels, Sean Patton, Christopher Parker, Frank Ricci, Edward Riordon, Kevin Roxbee, Timothy Scanlon, Benjamin Vargas, John Vendetto, Mark Vendetto, Michael Blatchley, Greg Boivin, Gary Carbone re 60 MOTION for Summary Judgment. (Malone, P.) (Entered: 07/17/2006)

* * *

07/14/2006 119 Supplemental RESPONSE re 60 Motion for Summary Judgment re 115 Memorandum in Support of Motion,,, and re: 52 Motion for Summary Judgment re 114 Response,, filed by Michael Christoforo, Ryan Divito, Steven Durand, William Gambardella, Brian Jooss, James Kottage, Matthew Marcarelli, Thomas J. Michaels, Sean Patton, Christopher Parker, Frank Ricci, Edward Riordon, Kevin Roxbee, Timothy Scanlon, Benjamin Vargas, John Vendetto, Mark Vendetto, Michael Blatchley, Greg Boivin, Gary Carbone. (Torre, Karen) Modified on 7/17/2006 To create links to docket #'s 52 &60 Motions (Malone, P.). (Entered: 07/14/2006)

07/17/2006 121 RESPONSE re 52 Motion for Summary Judgment And 60 Motion for Summary Judgment re 119 Response, filed by John DeStefano, Karen Dubois-Walton, Thomas Ude, Jr, Tina Burgett, Boise Kimber, Malcolm Weber, Zelma Tirado, City of New Haven. (Attachments: # 1 Exhibit A)(Roberts, Richard) Modified on 7/18/2006 to create links to motion Docket #'s 52 &60 Motions (Malone, P.). (Entered: 07/17/2006)

* * *

08/04/2006 126 Memorandum in Opposition re 52 First MOTION for Summary Judgment, 118 MOTION to Preclude Plaintiffs' Proposed Submissions filed by Michael Christoforo, Ryan Divito, Steven Durand, William Gambardella, Brian Jooss, James Kottage, Matthew Marcarelli, Thomas J. Michaels, Sean Patton, Christopher Parker, Frank Ricci, Edward Riordon, Kevin Roxbee, Timothy Scanlon, Benjamin Vargas, John Vendetto, Mark Vendetto, Michael Blatchley, Greg Boivin, Gary Carbone. (Torre, Karen) (Entered: 08/04/2006)

08/07/2006 127 REPLY to Response to 52 First MOTION for Summary Judgment *and 121 response to reply brief* filed by Michael Christoforo, Ryan Divito, Steven Durand, William Gambardella, Brian Jooss, James Kottage, Matthew Marcarelli, Thomas J. Michaels, Sean Patton, Christopher Parker, Frank Ricci, Edward Riordon, Kevin Roxbee, Timothy Scanlon, Benjamin Vargas, John Vendetto, Mark Vendetto, Michael Blatchley, Greg Boivin, Gary Carbone. (Torre, Karen) (Entered: 08/07/2006)

08/09/2006 128 First RESPONSE re 126 Memorandum in Opposition to 52 Motion for Summary Judgment 121 Response

		118 MOTION to Preclude Plaintiffs' Proposed Submissions, 127 Reply to Response to Motion, filed by John DeStefano, Karen Dubois-Walton, Thomas Ude, Jr, Tina Burgett, Boise Kimber, Malcolm Weber, Zelma Tirado, City of New Haven. (Roberts, Richard) Modified on 8/10/2006 (Malone, P.). (Entered: 08/09/2006)
		* * *
09/28/2006	132	RULING granting 52 First MOTION for Summary Judgment, denying 60 Motion for Summary Judgment. Signed by Judge Janet Bond Arterton on 9/28/06. (Pesta, J.) (Entered: 09/29/2006)
09/29/2006	133	JUDGMENT in favor of defendants. Signed by Clerk on 9/29/06. (Pesta, J.) (Entered: 09/29/2006)
10/27/2006	134	NOTICE OF APPEAL as to 132 Ruling on Motion for Summary Judgment,, 133 Judgment by Michael Christoforo, Ryan Divito, Steven Durand, William Gambardella, Brian Jooss, James Kottage, Matthew Marcarelli, Thomas J. Michaels, Sean Patton, Christopher Parker, Frank Ricci, Edward Riordon, Kevin Roxbee, Timothy Scanlon, Benjamin Vargas, John Vendetta, Mark Vendetto, Michael Blatchley, Greg Boivin, Gary Carbone. Filing fee $ 455, receipt

number N019690. (Malone, P.) (Entered: 10/30/2006)

* * *

RELEVANT DOCKET ENTRIES

US Court of Appeals for the Second Circuit

Court of Appeals Docket #: 06-4996-cv
Nsuit : 3442 CIVIL RIGHTS – Jobs

Ricci v. DeStefano Filed 10/30/06

Appeal from: CONNECTICUT (NEW HAVEN)

* * *

10/30/06 Copy of notice of appeal and district court docket entries on behalf of APPELLANT Benjamin Vargas, Brian Jooss, Christopher Parker, Edward Riordon, ET AL , filed. [Entry date Nov 13 2006] [EA]

* * *

1/26/07 APPELLANT Benjamin Vargas, Brian Jooss, Christopher Parker, Edward Riordon, ET AL, brief FILED with proof of service. [Entry date Feb 26 2007] [EA]

* * *

3/5/07 Order FILED GRANTING motion seal document by Appellant Timothy Scanlon, Appellant James Kottage, Appellant Frank Ricci, Appellant Michael Blatchley, Appellant Greg Boivin, Appellant Gary Carbone, Appellant Michael Christoforo, Appellant Ryan Divito, Appellant Steven Durand, Appellant William Gambardella, Appellant Brian Jooss, Appellant Matthew Marcarelli, Appellant Thomas Michaels, Appellant Sean Patton, Appellant Christopher Parker, Appellant Edward Riordon, Appellant

Kevin Roxbee, Appellant Benjamin Vargas, Appellant John Vendetto, Appellant Mark Vendetto, endorsed on motion dated 2/20/2007.

Before: Hon. Sonia Sotomayor, Circuit Judge IT IS HEREBY ORDERED that the motion for leave to file Vol. III of Joint Appendix under seal is GRANTED.(TWY) [Entry date Mar 5 2007] [EA]

* * *

3/15/07 APPELLEE City of New Haven, Boise Kimber, John DeStefano, Karen Dubois-Walton, ET AL, brief filed with proof of service. [Entry date Mar 16 2007] [EA]

* * *

4/5/07 APPELLANT Benjamin Vargas, Brian Jooss, Christopher Parker, Edward Riordon, ET AL, reply brief filed with proof of service. [Entry date Apr 20 2007] [EA]

* * *

10/31/07 Bridgeport Firefighters for Merit Employment, Inc. brief filed with proof of service. [Entry date Oct 31 2007] [SC]

10/31/07 Center for Individual Rights brief filed with proof of service. [Entry date Oct 31 2007] [SC]

* * *

12/10/07 Case heard before POOLER, SACK, SOTOMAYOR, C. JJ

CD DATE: 12/10/07 [Entry date Dec 10 2007] [RD]

* * *

2/15/08 Judgment filed; judgment of the district court is AFFIRMED by detailed order of the court without opinion, filed. (RSP) [Entry date Feb 15 2008] [TM]

* * *

5/22/08 Notice of filing petition for writ of certiorari dated 5/16/08 filed. Supreme Court #: 07-1428. [Entry date May 28 2008] [EJ]

6/9/08 Judgment of the district court is AFFIRMED by published unsigned PER CURIAM opinion filed. [Entry date Jun 9 2008] [AM]

6/9/08 Judgment filed. [Entry date Jun 9 2008] [AM]

* * *

6/12/08 Order filed stating "After disposition of this appeal by summary order dated February 15, 2008, an active judge of the Court requested a poll on whether to rehear the case in banc. A poll on whether to rehear the case in banc was conducted among the active judges of the Court. After the poll was concluded, on June 9, 2008, the original three-judge panel withdrew the summary order and filed a per curiam opinion; no subsequent in banc poll has been requested. Because a majority of the court's active judges voted to deny rehearing in banc, rehearing in banc is hereby DENIED. Judges

Calabresi, Straub, Pooler, Sack, Sotomayor, Katzmann, and B.D. Parker concur in the denial of rehearing in banc. Chief Judge Jacobs and Judges Cabranes, Raggi, Wesley, Hall and Livingston dissent from the denial of rehearing en banc. With this order, Judge Katzmann is filing a concurring opinion, in which Judges Pooler, Sack, Sotomayor and B.D. Parker joins; Judge B.D. Parker is filing a concurring opinion, in which Judges Calabresi, Pooler, Sack, and Sotomayor join; and Judge Cabranes is filing a dissenting opinion, in which Chief Judge Jacobs and Judges Raggi, Wesley, Hall and Judge Livingston join. Other opinions may be filed with respect to this case, concurring or dissenting in the denial of in banc review." Before DJ, ChJ, GC, JAC, CJS, RSP, RDS, SS, RAK, BDP, RR, RCW, PWH, DAL, CJJ. [Entry date Jun 12 2008] [EJ]

6/12/08 Non-dispositive concurring opinion filed. (RAK, joined by RSP, RDS, SS and BDP, CJJ). [Entry date Jun 12 2008] [EJ]

6/12/08 Non-dispositive concurring opinion filed. (BDP, joined by GC, RSP, RDS and SS, CJJ). [Entry date Jun 12 2008] [EJ]

6/12/08 Non-dispositive dissenting opinion filed (JAC, joined by DJ, CHJ, RR, RCW, PWH, and DAL, CJJ). [Entry date Jun 12 2008] [EJ]

* * *

6/13/08 Non-dispositive concurring opinion filed (GC). [Entry date Jun 13 2008] [EJ]

* * *

6/17/08 Non-dispositive dissenting opinion filed. (DJ). [Entry date Jun 17 2008] [EJ]

* * *

9/17/08 Notice of filing petition for APPELLANT Benjamin Vargas, Brian Jooss, Christopher Parker, Edward Riordon, ET AL, filed on 9/8/08, and placed on the docket 9/11/08. Supreme Court # 08-328. [Entry date Sep 19 2008] [ML]

* * *

[LOGO] **Industrial/Organizational Solutions, Inc.**
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www.iosolutions.org

September 12, 2003

Memorandum to candidates participating in the lieutenant and captain promotional examinations.

Re: Inconsistencies among resource materials

The purpose of this memorandum is to clarify the manner in which inconsistencies among resources for the promotional examinations will be dealt with in the test-development process. I/O Solutions recognizes that the diversity of resources can lead to differences in conveyance of information among authors. For this reason, I/O Solutions follows a standard process to reduce the possibility that a test item (question) is the object of conflicting information provided by various authors/editors. First, resources are analyzed to determine areas/chapters where the same type of information is being conveyed. As a general rule, we avoid developing questions concerning topic areas that do not demonstrate consensus between authors/resources. Second, all items contained in the final promotional examination are reviewed to identify items from different resources that focus on the same topic area. These items are carefully scrutinized to make sure that they are not

predicated on information contained in multiple resources that could be deemed "contradictory." Finally, all items in the promotional examination will be presented in sections based on the item's resource of origin. This practice will help create a frame of reference that may be helpful when responding to each test item. In general, all reasonable steps will be taken to develop straightforward, relevant test questions.

An appropriate example of the type of inconsistencies that may be present between sources is illustrated by the different building construction classification systems that John Norman (Fire Officer's Handbook of Tactics) and Francis Brannigan (Building Construction for the Fire Service) reference. For example, the building "types" and "classes" may not always be consistently named. To avoid confusion, questions about this material will always refer to the name of the building type rather than its number. Also, questions that deal specifically with building construction are more likely to be drawn from the building construction resource rather than a tactical resource.

It is I/O Solutions' goal to measure fundamental job knowledge of promotional candidates. I/O Solutions does assert that the reference materials chosen for inclusion in the testing process are superior job-knowledge resources in the fire industry. Subject-matter experts from the department assisted I/O Solutions in the selection of resources that are appropriate for the New Haven Fire Department. All items developed for the promotional examination will be

subject to a rigorous item review process to ensure that items accurately assess the most important knowledge areas.

Best regards,
I/O Solutions, Inc.

Cc: Tina Burgett, Director Human Resources
Noelia Marcano, Chief Examiner
Civil Service Board Commissioners (5)

VERBATIM PROCEEDINGS

CITY OF NEW HAVEN
CIVIL SERVICE COMMISSION

IN RE:
FIRE CAPTAIN AND LIEUTENANT
PROMOTIONAL EXAMS

JANUARY 22, 2004

KENNEDY MITCHELL HALL OF RECORDS
200 ORANGE STREET
NEW HAVEN, CONNECTICUT

* * *

[19] FEMALE VOICE: (indiscernible) if we used them five years ago (indiscernible)

FEMALE VOICE: Okay. I think I addressed that. You had asked if we had used them five years ago. And we had used them once before in 2000 for test development of firefighter entry-level testing.

MALE VOICE: But they didn't do this exam five years ago.

FEMALE VOICE: Right.

CHAIRPERSON SEGALOFF: But they did another exam for firefighters?

FEMALE VOICE: Correct.

CHAIRPERSON SEGALOFF: And how did the results compare, to use the words you used, the demographics – what were the results years ago? Do you [20] know?

FEMALE VOICE: (indiscernible)

MALE VOICE: Mr. Chairman, I think there's two difficulties with that. One, the firefighter's exam itself is a pass/fail exam. It's not – there's no grade. There's no scoring or rank ordering of the results of the exam –

CHAIRPERSON SEGALOFF: Oh, really?

MALE VOICE: – on a firefighter entry-level exam. So I don't know that – apart from whether or not any review of or comparison of the two was done, I can say that as part of the process every time that Human Resources and Civil Services prepares, administers, conducts and scores an examination that – a review of the examination to determine whether there is or is not a disparate or adverse impact against any ethnic, racial or gender group takes place in order to make sure that the City's selection process complies with both our Charter, which prohibits discrimination on any of those grounds, and also federal law, which requires examination of not only intentional discrimination but a process that has a discriminatory effect. And I'll talk a little bit more about that once they've gotten through the information that's on the lists that they've passed out.

[21] FEMALE VOICE: Well, I think in order for us to (indiscernible) discussion we had into context and to even know how to continue the inquiry, we need to know what is the disparity. (Indiscernible)

MALE VOICE: (indiscernible)

MS. BURGETT: If you would turn to the second page (indiscernible). What we've provided on – on the second page, what we did is we took a look at the numbers of individuals in the Fire Lieutenant examination by year and by race and Captain examination by year and by race. As you can – and then we also have given you some information about rankings.

The Fire Lieutenant examination by race – there have been three exams, 1996, 1999, 2003. The other columns tell you the number of individuals by ethnicity who have passed that particular year. I'm not showing you fail rates. In this particular case, I think it's relatively self-explanatory. There were 50 Caucasians who passed, 13 African-Americans, 6 Latino in '96. In 1999, there were 25 Caucasians who passed, 8 African-Americans, 9 Latino. In 2003, there were 26 Caucasians, 6 African-Americans and 3 Latino.

We then took a look at the ranks by race. In 1996, Caucasians were in Rank No. 1, African-[22] Americans in Rank No. 3, Latinos in Rank No. 4. In 1999, Caucasians were in Rank No. 1, African-Americans in Rank No. 5, Latinos in Rank No. 1. (sic) In 2003, Caucasians are in Rank No. 1, African-Americans are in Rank No. 13 and Latinos in Rank 26.

This is a ranking system that has been – that we're using as given to us by the court system in the last week.

MALE VOICE: Ms. Burgett, just for clarification, when you're saying – identifying the ranks, when you say on the current – as a result – on the

current Lieutenant scores, the highest African – there's an African-American in Rank 13. That's the highest rank that any African-American who took and passed the exam would be placed in?

MS. BURGETT: That is correct.

MALE VOICE: Not that all of any given race are in any particular rank.

MS. BURGETT: Right.

The Captain's examination we also did by year. We had two years to review, 1998 and 1999, for the Captain's examination. There were 35 Caucasians who passed, 7 African-Americans, 3 Latino. In 2003, there were 16 Caucasians, 3 African-American and 3 Latino.

[23] We looked at the ranks. Again, similar to Fire Lieutenant. And in 1999, Caucasians were in Rank 1, African-Americans in Rank 5 and Latino in Rank 4. In 2003, Caucasians were in Rank 1, African-Americans in Rank 15, Latino in Rank 6.

On the first page, I have given you a breakout of the demographics of the 336 members of Fire Suppression Services. There are other divisions within the Fire Department that are not included here. But we wanted to give you a breakdown of the demographics. Again, we're doing a data analysis review and we took a look at these demographics. Unless there's a –

* * *

[53] CHAIRPERSON SEGALOFF: Why don't we see what people have to say (indiscernible) about this exam? Educate ourselves.

MALE VOICE: Oh, I think that's very reasonable.

FEMALE VOICE: And then at some point hear from the public.

FEMALE VOICE: But I don't even know what the public is thinking right now.

CHAIRPERSON SEGALOFF: Well, that's what I just said, Francine. We have to educate ourselves and let everybody get a chance to speak. My only question is (indiscernible)

FEMALE VOICE: Why don't we [54] (indiscernible)

CHAIRPERSON SEGALOFF: That's my question for everybody here. Should we – this meeting was not a public meeting, not a meeting for public input. This is like the City Plan meetings that we go to sometimes where it's not open to the public and the commission meets and doesn't take public testimony.

So – and no one has any of this information. I just think, while it's unfortunate that everyone is here, that it's going to much more of an educated response if everybody – I don't know what you could give to the public. But they've sat here. Give them whatever we're permitted to give them.

FEMALE VOICE: Can they have (indiscernible)

MALE VOICE: Copies of everything that were distributed to the commissioners –

CHAIRPERSON SEGALOFF: Well, give them everything. And then we have a meeting –

FEMALE VOICE: That way they've got (indiscernible)

CHAIRPERSON SEGALOFF: – whenever, next week, or a meeting as soon as we can. And anyone who wants to – they've got all (indiscernible) we'll go all [55] night. A limited period of time for everybody who wants to speak. And then go from there.

FEMALE VOICE: I feel like we should have some people speak tonight.

CHAIRPERSON SEGALOFF: Well, what are you going to do, Francine, about – I know they're here. Are we going to let the same people come back and speak again or are those that are going to speak today don't come back? We can't accommodate everybody. I mean do you want to do that? But I would think they might be better off, the public, listening first to what the experts have to say and then maybe their response might be – what they have to say is more meaningful. I don't – if people want to speak, it's okay. But I don't want to bring the same speakers back again in a week. If you speak now –

FEMALE VOICE: I think it's good to have a few different groups to speak tonight to hear what a few different groups – it doesn't have to be every single person. But it would give me a feeling of what's going on. I still am not sure –

MALE VOICE: I guess I'm not clear what it is you're going to be asking – looking for them to provide you with information about, other than their [56] subjective – someone who took the exam, their subjective experience as one of the however many people who took it. Or if it's someone who didn't take it – I don't know. Maybe there are, you know, Title VII experts that are here. I'm not about to say that there aren't. But they – even they would not have had the data upon which to form a conclusion until this evening.

FEMALE VOICE: I just think if we listen to the company first and then listen to the public, we'll be able to understand better what the public is trying to tell us after the consultant (indiscernible).

MALE VOICE: (Indiscernible) is sitting out here right now (indiscernible). And I think the Chair should recognize (indiscernible)

MALE VOICE: Okay. I said before I'm not –

MALE VOICE: I know. But you're (Indiscernible)

FEMALE VOICE: Like I said, I think that we should start with the company. That's my position.

CHAIRPERSON SEGALOFF: Well, are we agreed that we're going to have a Special Meeting to take testimony?

FEMALE VOICE: A public hearing?

[57] CHAIRPERSON SEGALOFF: We're agreed that that's what we're going to do. The only question is do we start with it now or wait until –

FEMALE VOICE: Why don't we? I mean (indiscernible)

CHAIRPERSON SEGALOFF: (Indiscernible) We'll limit the amount of speakers. We'll limit the amount that each speaker can speak. And –

FEMALE VOICE: Right.

CHAIRPERSON SEGALOFF: We're going to do our best; that if you speak now, don't – we're going to limit it. You're going to be at the very end of the list next time, if we can fit you in.

FEMALE VOICE: And we're agreeing to meet again when?

CHAIRPERSON SEGALOFF: Well, we've got to get a time.

FEMALE VOICE: We have to get (indiscernible)

MALE VOICE: And at that time, people should register that they wish to speak in advance –

CHAIRPERSON SEGALOFF: They'll have to sign up.

MALE VOICE: – and we'll have complete [58] rules on it. But I think we should hear from a limited number of speakers tonight –

FEMALE VOICE: Yes.

MALE VOICE: These people came. They have a right to speak.

FEMALE VOICE: Yeah.

CHAIRPERSON SEGALOFF: All right. We're going to – we'll do that. Now –

FEMALE VOICE: (Indiscernible)

CHAIRPERSON SEGALOFF: What's a reasonable period of time for each speaker?

FEMALE VOICE: Three minutes.

CHAIRPERSON SEGALOFF: Okay.

FEMALE VOICE: Five minutes. Three minutes. (indiscernible)

FEMALE VOICE: Yeah. They should state their name –

FEMALE VOICE: We're not going to be able to do a transcript –

FEMALE VOICE: Right.

FEMALE VOICE: – as we were planning for the public hearing.

FEMALE VOICE: And they can stand here so (indiscernible)

[59] FEMALE VOICE: Yeah. They'll have to stand right here in front of the mike.

MALE VOICE: (Indiscernible)

MALE VOICE: How long are we giving each speaker? Five minutes?

FEMALE VOICE: We will not able to transcribe this –

MALE VOICE: (indiscernible) time in between.

CHAIRPERSON SEGALOFF: We'll go for an hour.

MALE VOICE: That's about ten speakers.

CHAIRPERSON SEGALOFF: Well, we'll do the best we can.

All right. Here's – I don't know if we're going to make it in the form of a motion.

FEMALE VOICE: Yeah. I make a motion that representative – ten? Is that what we decided? Or how many –

MALE VOICE: Well, ten will run it down to about an hour.

FEMALE VOICE: Okay. About eight?

CHAIRPERSON SEGALOFF: Ten is good.

FEMALE VOICE: Okay. Ten people will be [60] allowed to speak today. We will – before our formal public hearing, which will be in the near future. They would be limited to an amount of three minutes each. State your name and title and sign in here when you come up to speak. And be very succinct and let us know what your opinion is on this matter.

MALE VOICE: Make clear that they cannot speak –

CHAIRPERSON SEGALOFF: Here's what we're going to do, everybody. We're going to have another meeting as well. What we're saying is if you speak tonight, we're not promising you – we're doing this as we go along – that at the next meeting, which is a public hearing, that you're going to get a chance, a second bite at the apple. We're going to make sure first that everybody gets a – do our very best that everybody gets a chance to speak. Okay? So if you get up tonight, we can't commit to you that you'll get the opportunity to speak at the next meeting.

In terms of selecting people, I mean I don't know that anybody represents any – I don't – let's do our best to – if there are people who feel – and I guess if there's a representative of some group, I guess we'd do our best to get you up there.

[61] MALE VOICE: Yeah. Can I ask a question?

CHAIRPERSON SEGALOFF: Sure.

MALE VOICE: You said if we speak tonight – my name is Patrick (indiscernible). If we speak tonight, we may not be able to speak (indiscernible). At that meeting, is it the commission's intention to have I/O Solutions here to deal with questions with – you know, in regard to the exams? That's what I'm gathering.

CHAIRPERSON SEGALOFF: That's our intention. And it's also our intention –

FEMALE VOICE: We'll do our best.

MALE VOICE: And/or is it your – (indiscernible) anything being asked for any type of (indiscernible) evaluation study (indiscernible)

CHAIRPERSON SEGALOFF: I think if we're going – one step at a time. I think our first step is just hearing all – (indiscernible) we're going to start with the group that prepared it. I would like to – and I (indiscernible) as we go along here – bring in an expert, someone else who gives these tests, another – and have them review what was done and give us their opinion. I don't know how the board feels. But it's – at this point in time, the plan is to bring it to the next open meeting. Everyone who is there, try to give [62] them an opportunity to speak. And have the person from the testing agency. And

possibly – we'll talk about – other sources maybe to speak on the issue of the test.

MALE VOICE: I would prefer to wait until I (indiscernible).

MALE VOICE: The only other thing I would add is we – we will have a Court Reporter at the next one, which will allow us to do a word-for-word transcript of what is said, which as best we try I can't say we will be able to have a (indiscernible)

CHAIRPERSON SEGALOFF: The other thing that I would state is that I think (indiscernible) anybody wants to send a letter giving a point of view, information, whatever they think is relevant, I can just assure you we'll make it part of our record and we'll read every letter as just a matter of (indiscernible)

MALE VOICE: (Indiscernible)

CHAIRPERSON SEGALOFF: Is there any reason not to (indiscernible) what was handed out?

FEMALE VOICE: Yeah. We'll make copies.

MALE VOICE: We have copies. I don't know that we have enough for everybody. But we can do a separate list for people who would like them. I think there may be some leaders of some organizations that are [63] present tonight that might be able to give them to their leaders. I would request that only because administratively it would be easier for everybody. But, absolutely, any – what was passed

out tonight it was our intention would become – would be public. It was not distributed prior because we didn't think that would be appropriate. But –

CHAIRPERSON SEGALOFF: All right. Let's –

FEMALE VOICE: (Indiscernible)

CHAIRPERSON SEGALOFF: We're going to have a cut-off date for the letters. What's our – well, we haven't set a date yet for our next meeting.

FEMALE VOICE: Right.

CHAIRPERSON SEGALOFF: Let's do that first. Okay?

FEMALE VOICE: (indiscernible) a motion (indiscernible)

FEMALE VOICE: We have a motion. There is no second yet.

MALE VOICE: I'll second. I'll –

CHAIRPERSON SEGALOFF: Read the motion.

MALE VOICE: Well, read the motion.

FEMALE VOICE: The motion – motion that ten people will be allowed to speak today, limited to [64] three minutes each. State their name, title, sign the sign-up sheet and give opinions.

CHAIRPERSON SEGALOFF: Okay.

MALE VOICE: I'll second.

CHAIRPERSON SEGALOFF: All in favor?

VOICES: Aye.

CHAIRPERSON SEGALOFF: Let's try to set a date now first so people – for our next – for our Special Meeting. What are our time frames?

FEMALE VOICE: How long do we think it's going to take to get this I/O –

MALE VOICE: (indiscernible)

FEMALE VOICE: I think the sooner the better.

MALE VOICE: (Indiscernible)

CHAIRPERSON SEGALOFF: Okay. Let's set a date. Then we'll –

FEMALE VOICE: Okay. I'm not available on Monday and Wednesday –

CHAIRPERSON SEGALOFF: Next week? Did you want to (indiscernible) next week?

MALE VOICE: Yeah.

FEMALE VOICE: Yeah. I think we should do it the sooner the better.

[65] CHAIRPERSON SEGALOFF: Well, we've got to get this I/O Solutions here.

FEMALE VOICE: We have to consultant. And I would not want to guarantee that Tuesday (indiscernible)

FEMALE VOICE: How about Thursday?

FEMALE VOICE: (Indiscernible) pick a few tentative – a few tentative dates –

FEMALE VOICE: Why don't you pick two or three for us to work with?

FEMALE VOICE: How about the 29th? Thursday the 29th? A week from today?

MALE VOICE: The only thing I don't know administratively is as far as confirming the availability of this room.

CHAIRPERSON SEGALOFF: So why don't we set a couple of dates? We've got to give notice to the public. We've got to let them know.

MALE VOICE: Right.

CHAIRPERSON SEGALOFF: So we'll do the best we can to –

MALE VOICE: I would expect that the date of the hearing will probably be in the paper.

CHAIRPERSON SEGALOFF: It will.

[66] MALE VOICE: (indiscernible) So we will make sure that it's posted as many places as we can think of.

CHAIRPERSON SEGALOFF: So the 29th is a good –

FEMALE VOICE: One possible date, the 29th?

FEMALE VOICE: 29th?

FEMALE VOICE: 1/29? Absolutely.

MALE VOICE: What night of the week is that?

FEMALE VOICE: Thursday. Thursday the 29th.

FEMALE VOICE: There's availability? Are you available? All available? Mal?

MALE VOICE: As far as I know right now. But I have to check –

FEMALE VOICE: On the 29th?

CHAIRPERSON SEGALOFF: What's the next Tuesday?

FEMALE VOICE: Jim is out of town.

FEMALE VOICE: That's the 3rd.

FEMALE VOICE: The 3rd.

CHAIRPERSON SEGALOFF: Wednesday or Thursday I can do. I can't do it Monday.

[67] FEMALE VOICE: I can't do Wednesday.

FEMALE VOICE: How about Thursday the 5th?

CHAIRPERSON SEGALOFF: Thursday the 5th?

FEMALE VOICE: How is Monday the 2nd?

FEMALE VOICE: I can't.

FEMALE VOICE: These are far enough (indiscernible)

FEMALE VOICE: Yeah. (indiscernible) is actually probably very –

MALE VOICE: Either the 29th or the 5th.

CHAIRPERSON SEGALOFF: The 29th or the 5th.

FEMALE VOICE: Right.

CHAIRPERSON SEGALOFF: And you'll call that Solutions and –

FEMALE VOICE: Yes.

MALE VOICE: All right. We're heading for the 5th right now. Right?

FEMALE VOICE: Yeah. All right.

CHAIRPERSON SEGALOFF: Okay.

FEMALE VOICE: Same place, same time.

FEMALE VOICE: All right. Does anybody want to come up and –

CHAIRPERSON SEGALOFF: All right?

MALE VOICE: Can I ask a question?

[68] CHAIRPERSON SEGALOFF: Sure.

MALE VOICE: I think (indiscernible) most people here who probably have a very particular interest, they're more interested in the next meeting that you spoke about because they don't want to be just shut off here and then be put at the bottom of the list next time. So I don't know how the rest feel about that. But I think that's the wiser (indiscernible) people who have something to say and not be (indiscernible)

CHAIRPERSON SEGALOFF: I guess if we could limit it to a handful of people, then we can – it won't make any difference. We can get them (indiscernible)

MALE VOICE: I can speak for my own case. In my opinion, I've heard enough tonight (indiscernible) and that's going to take a while.

FEMALE VOICE: Excuse me. What is your name, sir? For the record, your name?

MALE VOICE: (indiscernible)

CHAIRPERSON SEGALOFF: Well, we started off with a rule of three minutes. Do we have anybody that wants to come up?

FEMALE VOICE: For three minutes.

MALE VOICE: I just have a question. At the next meeting, will we be permitted (indiscernible)

[69] CHAIRPERSON SEGALOFF: I don't see why not.

MALE VOICE: (indiscernible) fire chief, the test givers and the test takers. That's the only people affected. Test givers, test takers, your board, commissioners (indiscernible)

CHAIRPERSON SEGALOFF: I think first it's a public meeting. So you can't sit in a public hearing and say we're limiting the public to those who took the test and those who are –

MALE VOICE: (indiscernible) and nobody, you know – you only have a handful of people speaking.

CHAIRPERSON SEGALOFF: Well, (indiscernible) – it took us – we're prepared to have some people speak. I mean –

FEMALE VOICE: Come on up.

FEMALE VOICE: Yeah.

MALE VOICE: If I could just say one thing? With regard to the letters that people received, one note. The reason that people who took the examination received letters about tonight's meeting is because we thought that was the best way to get – the quickest notification to people about what was going on. Because we knew that the people who took

the exam had a [70] lot of questions about what had happened and what was going on. So (indiscernible)

MALE VOICE: Let them speak and then come back and we'll cut it off –

CHAIRPERSON SEGALOFF: Then we're going to change the rules. But just to get this – you can speak, limited to three minutes, and you won't be penalized the next time around. If you want to come up – but for three minutes, talk to us about what you want to talk to us about. And you're not going to be penalized when we have the next meeting. I'm not sure where you'll be on the list. But – all right? So why don't you start? We'll bring a couple of people up. Do your best please to try to limit it –

FEMALE VOICE: We'll time people, Mr. Chairman.

CHAIRPERSON SEGALOFF: It just won't be fair to let someone ramble and then –

FEMALE VOICE: (Indiscernible)

CHAIRPERSON SEGALOFF: Yeah. Give us a two-minute break please.

FEMALE VOICE: I'm turning the tape off. Time please? 7:10 P.M.

(Off the record)

[71] CHAIRPERSON SEGALOFF: Oh, guys? Some people are leaving. I've been asked that it is important that you can't contact us individually. I

don't want to have to – I mean this has happened on occasion. We have to say to people, "Sorry. We can't talk to you. We can only do it at a public meeting." So, please, as much as I think a lot of us would be interested in talking to you one on one, we can't do it. Okay?

And we're all set (indiscernible) Okay.

* * *

[76] FEMALE VOICE: Gary Kinney?

MALE VOICE: Let me start –

FEMALE VOICE: Your name and address?

LT. KINNEY: Lieutenant Kinney.

FEMALE VOICE: Address?

LT. KINNEY: 34 Leo Road, Hamden, Connecticut. I just wanted to say a little bit about the [77] question. I mean myself and the shift that I'm on, we took – I saw a lot of these guys put thousands of hours in studying for this exam. And what's a major problem is these books that were given (indiscernible) the syllabus that we had, the syllabus – these guys knew what we were going to study. They had the books well before the syllabus came out. The only books that most of us had in front of us in the fire houses were Essentials of Fire Fighting. And this is what our department (indiscernible). Again, these books were never in the fire houses. We didn't – we didn't have – I personally – and a lot of other people

that I talked to didn't personally have these books. But numerous people have these materials. Okay?

I think that, that right there, is unfair (indiscernible). And another thing that you need to look at –

FEMALE VOICE: Are the books different from the ones you (indiscernible)

LT. KINNEY: Yes. The Essentials – the only book that's in every fire house is the Essentials of Fire Fighting, which we were trained when we started in this department and which we base our operations on. These other books came out of New York. They're the [78] Chiefs from New York that wrote these books. Their makeup of their city and everything is totally different than ours. And some of these books are very contradictory. One would say one thing. Another book would say another thing. And then our department would say another thing.

So when we go in and take these tests, who do we believe? Do we go by – yeah. They say, "Yeah. Go by the material." But I go by what my department tells me to do. I don't go by what other people from outside the department tell me to do. So if my Chief says, "This is the way I want things done", that's the way I go by. That's the way I was taught. And those are the rules I'm going to follow.

So going in and taking the test – I'll give an example. They had one question. If you get into a motor vehicle accident en route to an emergency call,

what do you do? According to the test, the right answer was "Call a supervisor apparatus. Call the Chief of the department." You don't do that. Our policy is "Call the Battalion Chief. Call the Police Department. Call another company if there are any engines." That's our policy. So why take the question and put it on the test and ask us to answer it is this right or is this right [79] when we don't have supervisor apparatus?

You had numerous questions that were like that that challenged what you had up here as far as what was right as far as department policies. And that's wrong.

And like, again, I say I see these guys – I saw (indiscernible) study, studied every day, sharp kid. You're going to tell me this kid, this sharp boy that studied, does what he's supposed to do, comes to work, does his job, who is going home about the test and everything, that he failed this test? This kid is bright and sharp. There's no way. And I got to sit here and see him with his head down because he hears that he didn't pass the test. That's a slap in the face. It's not fair. And like, again, there's enough divisiveness among this department. I thought we were supposed to be comrades and we were together. That's what firefighting is supposed to be all about. But it's not. These guys think there's so much diversity on this department.

I grew up around white, black. I don't care what color you are. I treat people based on how you treat

me. And things – the way things are going now hurts. And I know Chief Grant loves this department. But the diversity that goes around this department hurts [80] and it changes your views. It changes your values. And this test showing that no minorities passed –

FEMALE VOICE: Three minutes.

LT. KINNEY: It's not going to work. It's going to cause more diversity. And you're going to see more (indiscernible) over there in the corner and the Captain over there and the arguments over here. It's going to cause a big ruckus. And it doesn't make sense. We're supposed to be together. We're supposed to work together. We're supposed to save lives. And that's supposed to be the most important thing. And it's not.

(APPLAUSE)

FEMALE VOICE: Wayne Ricks?

MR. WAYNE RICKS: Good evening. Wayne Ricks, 144 Coleman Road, West Haven, Connecticut. I'd like to make a correction to what Ms. Marcano spoke about earlier. She said the board consisted of one black, one Hispanic, one Caucasian. That is inconsistent. My board consisted of one African-American, two Caucasians.

Other thing, you speak about (indiscernible)

MALE VOICE: What board are you referring to?

CHAIRPERSON SEGALOFF: What [81] (indiscernible)

MR. RICKS: The oral board for the Lieutenant's exam.

CHAIRPERSON SEGALOFF: Oh. Oh. I see.

MR. RICKS: The oral board. We're talking about the exams.

MALE VOICE: Okay. Okay.

MR. RICKS: We also speak about fairness. The last exam we gave curves. Over 18 guys benefited. And I don't think the majority of those were African-Americans.

Thank you.

FEMALE VOICE: Harpo Melendez?

MR. XAVIER MELENDEZ: Xavier Melendez, 260 Upson Terrace, New Haven, Connecticut.

FEMALE VOICE: I'm sorry.

MR. MELENDEZ: Xavier Melendez.

FEMALE VOICE: 260 Upson Terrace.

MR. MELENDEZ: New Haven.

FEMALE VOICE: Okay.

MR. MELENDEZ: I just want to echo Lieutenant Kinney. We all spent a lot of money, a lot

of time and purchasing these books. And we received a letter stating that we had (indiscernible) the test and [82] all the questions are pertinent information to your job description and what position you're applying for.

Some of the questions that I got on the Lieutenant were "Where do you position your apparatus – where do you position your apparatus? Uptown? Downtown? Underground? Things that we don't do in our department. Again echoing Lieutenant Kinney, I think possibly the board or fire experts should look at every question individually and maybe some of the results might change and they might – the changes on the test might get more people that we're, you know, we're looking for.

FEMALE VOICE: Are you talking about the oral exam?

MR. MELENDEZ: I'm talking about the written exam. And then also look at the oral exam. (indiscernible) chief of department, other experts to come in and look and say – another question, "Where is Engine 15 located?" When I came on, there was no Second Battalion, either east, west. That's it. No Second Battalion. And the letter that I received said pertinent information to your department. We don't have a Second Battalion. I never had it when I came on the job. So looking at that information, that's not pertinent to me because we don't have it.

[83] That's all I have to say.

CHAIRPERSON SEGALOFF: Thank you.

FEMALE VOICE: James Watson?

MR. JAMES WATSON: James Watson, 650 (indiscernible) I just want to start by saying I think (indiscernible) that we had to study from (indiscernible) buy books. I mean two kids and a wife. (indiscernible) That's one problem right there. From my understanding, I understand they didn't have to buy (indiscernible) material to study from. I mean we had (indiscernible) And that's over 1200 pages of reading material. (indiscernible) I think that was totally unfair. (indiscernible) prestigious schools in America. I mean it's not the best. But it's a pretty good school. I'm not saying I'm saying the smartest kid on the job. But nor am I the stupidest. I think that material was more than what you would have (indiscernible). I think that was just (indiscernible) that they had to curve the exam, the last exam, and they had less materials to study. They had to actually give a curve on the last exam (indiscernible) to pass. They gave a curve. I don't know if you're aware of that. So I mean they had less materials. Not only that, they gave them a curve so they could pass. And now here it is they're giving a test [84] that's four times harder – I mean four times the reading material and it's much harder and you have to put in more time (indiscernible) was the test fair? I mean it depends on where you're standing to ask that question. Because fair (indiscernible) material that was based on mostly the New York Fire Department material. Okay? I don't know about anybody else in this room. But I fight

fires here in New Haven, Connecticut. I mean they asked questions about – what somebody else said. You have a fire in uptown Manhattan. And which way do you approach the fire from, from the uptown side or from the downtown side? I mean they did (indiscernible) could have pulled that question out of there. But it was two different ways that they could have posed that question to you. And I fight fires here in New Haven, Connecticut, not in New York City where there's an uptown side you have to approach a fire or downtown side you have to approach a fire.

And after (indiscernible) Rules and Regulations was outdated. I mean it was so outdated it was ridiculous. I think somebody else brought up another question about which company (indiscernible). And I believe the answers were Emergency 3, Engine 16 or Engine Company 3. Three of those companies are out of service. [85] I mean it might have been a no-brainer. Yeah, that's an easy answer. That obviously says the material that was given to the company (indiscernible) test us on was outdated material. There was another question in there based on inch and three quarter line and inch and a half line. I mean here in this department, when I first came on the job in 1998, we were just making that transition from inch and a half line to inch and three quarter line. We don't inch and a half line. (indiscernible) to fight fires (indiscernible) And that was a question where if you know the knowledge of the department and what you do on the job, yeah, (indiscernible)

FEMALE VOICE: Three minutes.

MR. WATSON: Excuse me.

FEMALE VOICE: Three minutes.

MR. WATSON: I think I made my point. I think this test was unfair. We don't use a lot of things that were on that test.

CHAIRPERSON SEGALOFF: Mr. Watson, I have a question.

MR. WATSON: Yes, sir?

CHAIRPERSON SEGALOFF: (indiscernible) about materials. And someone else made a comment – I think it's important for us to understand. I'm trying to [86] understand what materials people have to buy, what materials are available to you and there seems to be some discussion that there's some other materials that maybe are available to some, not to others. So just tell me where does that – there's some material that can be purchased. Right? For $500.00? Is that –

MR. WATSON: The total of the books, the five books that we have to buy, must have been a total of about $500.00 (indiscernible) on those five books to buy (indiscernible) one book, a Fire Chief book, that we shouldn't even be reading (indiscernible)

CHAIRPERSON SEGALOFF: They're materials that anybody can buy. You've got to come up with $500.00. But –

MR. WATSON: Yeah.

CHAIRPERSON SEGALOFF: But were there any other materials that were circulated out there that – I don't know if I misheard – that maybe were distributed to some but not to others?

MR. WATSON: Well, a lot of people had these books prior to the examination being announced.

CHAIRPERSON SEGALOFF: A different book than the material you could buy for $500.00? Another set of books?

[87] MR. WATSON: No. The materials that we had (indiscernible) for this particular test, a lot of those books people had prior to the test being given. People had those books, you know, before – I don't know whether they (indiscernible) I don't know what the situation is. But people had those books prior to the examination. I mean the only book that was (indiscernible) fire house which they used on the previous exam was the Essentials of Fire Fighting, which was not (indiscernible). That's what we trained on. That's (indiscernible) Lieutenant's examination (indiscernible) not used on this examination. And in order for you to study and (indiscernible) and buy the material. I mean that was (indiscernible). And those books (indiscernible) like I did myself. So that might have been a setback for you right then if you didn't rush out and (indiscernible) one-day delivery (indiscernible) took a couple of weeks before I got mine. I mean I could go on and on (indiscernible).

MALE VOICE: Thank you.

CHAIRPERSON SEGALOFF: Thanks.

* * *

[95] FEMALE VOICE: All right. That's the end. of our list. I'm sure that –

A VOICE: (Indiscernible)

FEMALE VOICE: Wait. Wait one second.

All of us here, no matter what happens in this process – I'm sure I speak for all of us – value all of you as firefighters. I want you to know that because I think a lot of us have (indiscernible) animosity happening here. And it hurts all of us (indiscernible) to hear all of this anger coming out. And I hope in this process that we all – you should know that all of us on the board (indiscernible) that we will do this in a very fair way. We will look at everything. We will hear from everybody. But we all value all of you and the job you do every day for all of us.

CHAIRPERSON SEGALOFF: You know, (indiscernible) that I heard tonight was that Alderman (Indiscernible) save my baby. And (indiscernible) getting emotional. But it's just very sad to sit here and feel that I can't here, the board can't here, no matter what we do. I don't know that. It's just very sad. I'm not suggesting that anybody do anything. I'm just (indiscernible) it's a big burden for us [96] (indiscernible)

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VERBATIM PROCEEDINGS

CITY OF NEW HAVEN
CIVIL SERVICE BOARD

IN RE:
FIRE CAPTAIN AND FIRE LIEUTENANT
PROMOTIONAL EXAMINATIONS

FEBRUARY 5, 2004

KENNEDY MITCHELL HALL OF RECORDS
200 ORANGE STREET
NEW HAVEN, CONNECTICUT

[2] . . . Verbatim proceedings of a Hearing of the City of New Haven, Civil Service Board, In re: Fire Captain and Fire Lieutenant promotional examinations, held February 5, 2004, at 5:30 P.M., at the Kennedy Mitchell Hall of Records, 200 Orange Street, New Haven, Connecticut . . .

CHAIRPERSON JAMES SEGALOFF: A couple of sort of – I wouldn't say housekeeping. But perfunctory – they're sort of perfunctory – that I think we should deal with. One, Tom Ude provided us, the Commission, on January 22, a few weeks ago – it seems like months ago – with a summary of Civil Service laws. And I think we should just put that in the record. I've got a copy here that I wrote on. But

we should put that – that should be part of the record.

MR. THOMAS UDE: I did not bring any copies.

CHAIRPERSON SEGALOFF: Okay. That's okay. I'll get –

[3] MR. MALCOLM WEBBER: I have copies that I'll give to the Court Reporter.

CHAIRPERSON SEGALOFF: And we've got all of our Commissioners here with the exception of one. That's Francine Caplan. I'm Jim Segaloff. Mal Webber and Zelma Tirado. So that will go in the record.

I also want to put into the record, only because I feel I want to be very careful and as careful as I possibly can and do what – I try very hard to do the right thing all through these procedures. Is that I received a letter at home. It's not dated. But it was from Dr. Boise Kimber. And it was, in my view, very innocuous, simply saying that the last meeting – he didn't know the format and he understood that he was out of order – and I agree with him, by the way – and apologized for his being out of order. So I just want to enter this into the record. It's, I think, as I said, meaningless, innocuous letter. But it came to my house. And I feel I should make everybody aware of it and put it into the record.

Let me mention what is in Tom Ude's letter, who is the Corporation Counsel, that I think you should

all be aware of. You'll certainly have the right to look at it and see it.

[4] But what he tells us is that – this isn't really particularly warming to me. "New Haven Charter and Civil Service Rules, as well as Connecticut law, do not identify the mechanics of your board's review and do not describe one particular process for evaluating whether or not your rules have been complied with."

So, as some of you may remember from the last meeting, we were – I wouldn't say winging it. But we were certainly operating in a framework of trying to do what we felt was fair and appropriate and sensitive to all issues and all people who are involved in this process.

And as Tom Ude says and from what – and he's our counsel that we're relying on and we have a lot of faith in what he has to tell us. And he tells us there are no mechanics to help us in our review necessarily nor are there any particular processes.

So we're going to continue with the – in that – somewhat of that framework to proceed along the lines that we feel is open and fair-minded and trying very hard to hear and understand the views of all of you who feel you have something to say on some of these issues.

What Mr. Ude also says in his memo is [5] "What is clear, however, is that – we have the authority and the duty to determine whether or not to certify the

results of a particular exam. So we're taking on that responsibility. I think most of you know – I'll try to be a little quicker here.

But so you understand that our board gets an eligibility list after the exams are taken that have the results. And we are then given the responsibility to certify that list. And we've now got that list in front of us and we're being asked to certify it. And that's what we've got to – I believe that's what we've got to determine as to whether we want to – we feel we should certify those – that list.

Let me mention one or two other quick things. One is that I'm told that tonight we will not have with us the consultant or a representative of that consulting group that both prepared and administered the test nor will we have any statements from that person.

And it's my judgment – and I assume that we all agree – that that's important to us in making our decision to hear what that consultant has to say about this exam.

So what I am saying to you at this point, unless things change, that we do not anticipate making a [6] decision tonight. We recognize there's time limitations. And we're going to do everything we can. But we're not going to sit here and make such an important decision, in my opinion, if we don't have some additional – I don't know if I'd use the word evidence – some additional statements from some of the professionals in this field who have administered this

test that we can listen to, not necessarily rely on maybe, but certainly listen to in making that decision.

And we'll talk some more tonight about what else we may or may not want, what the Commission wants. We have not discussed this, obviously, amongst ourselves. What the Commissioners want in terms of additional expertise testimony to come before us and tell us about this exam.

That being said, it is very important for all of us to hear what all of you have to say about the exam. And we're going to open it up. We'll have a – do we have the sign-up sheet?

A VOICE: Right here.

CHAIRPERSON SEGALOFF: And I'd ask you to – I think it will go quicker if people sign up – let me finish this. Sign up now. We're going to give you four minutes. If there's someone out there – and I'm told [7] there's at least one person – who represents a group of people, it sure would be helpful – and I think we've – is it – someone said to you that they represent a group and –

MR. WEBBER: Right. Eleven of them. Eleven of the firefighters are being represented by the young lady over on the left. And she has requested that she have at least five minutes –

CHAIRPERSON SEGALOFF: Okay.

MR. WEBBER: – to represent the eleven, which I thought made sense.

CHAIRPERSON SEGALOFF: All right. All right. And if there's anybody else out there who represents a group of people, whatever the group is, we'll work that out. That would be great. It will give you a little more time. And if we can – you can speak for those people and we can avoid – or not have the necessity of having another ten people come up. That would move things along.

Secondly, we'd ask you to try not to be repetitious. If someone gets up here and talks about what we heard yesterday – last time, for example, the question about the fire – being asked, "When you come to a fire, do you park your truck uptown or downtown?" I [8] mean we've heard it once. I don't know that we need to keep hearing it. I mean if you feel you have to tell us that, I guess that's okay. But try not to keep repeating things.

Someone is going to be a timekeeper here. Just – after three minutes, someone will say – Tina will just say "You've got a minute". And do your very best. please. We'd expect in terms of fairness that you wind up in four minutes.

We'll go as long as we need to to get everyone a chance to be heard.

I don't have much more to add. I just – I don't know – Francine – Mal?

MR. WEBBER: No. I'm all set.

CHAIRPERSON SEGALOFF: Zelma, anything else?

Let me just – that's it. Well, obviously, at least the thought is tonight that we will do this again as soon as we can and get some other people in here to testify. And we'll see about the ground rules then. But to the extent we can do, you'll get a chance – some will get a chance to speak up again.

So we have a sign-up sheet. Could I ask you please, because it will go a little quicker, if you [9] do intend to speak, could you just come forward and sign up? And then we can move it right along.

MR. WEBBER: Well, if you're not signed up.

CHAIRPERSON SEGALOFF: If you're not signed up. It only looks like there's four or five names.

MR. WEBBER: That's fine.

CHAIRPERSON SEGALOFF: I'm not complaining.

Okay. Let's start with the top of the list and – well, someone should – you've got enough to keep you busy, I guess. Right?

MS. ZELMA TIRADO: I'll take it.

MR. WEBBER: Yeah. You can call the names.

* * *

[17] MS. KAREN LEE TORRE: Good evening. My name is Karen Lee Torre, Mr. Chairman, members of the board. I'm here on behalf of eleven firefighters who have retained my office to represent them. That list is growing, however. I expect to be representing a fair number more.

MS. TIRADO: Excuse me.

MS. TORRE: Yes?

MS. TIRADO: Can you –yeah.

MS. TORRE: My clients tonight are not in the room right now. By agreement, they, too, have decided to leave the room with other firefighters because they have a desire, unlike apparently what happened the [18] last time, to have this meeting be as civil and quiet as possible. And they have an interest in trying to maintain good relationships between and among them. So they agreed that I should speak for them and that they should leave along with those for whom Mr. Egan spoke.

But I am here – additionally, I'd like to raise a point of order. It is my understanding – and please feel free to correct me if I'm wrong – that one of your members has a relative or family member who is on the list, one – Captain's or Lieutenant's. And if that is the case, I would like that board member to recuse himself or herself.

CHAIRPERSON SEGALOFF: That's the easiest question since this all started. And I've got the easiest answer for you or the right answer. Barbara

Tinney, who is not here, I believe her – was it her brother? Her brother is a member of the Fire Department. He did speak. Barbara was not here last time. I don't know that she formally recused – was – she was recovering from back surgery. She's not here tonight.

And just on a personal level, I agree with you that she should recuse herself.

MS. TORRE: Very well.

CHAIRPERSON SEGALOFF: I don't – I expect [19] she has or will or will not participate in any of this.

* * *

[32] MR. DONALD DAY: Esteemed Commissioners, my name is Donald Day. I represent the Northeast Region of the International Association of Black Professional Firefighters.

We heard the union president talk about fairness, as the esteemed attorney talked about fairness. We also heard the esteemed attorney talk about the [33] results were statistically insignificant. You decide if this is statistically insignificant. Seventy-five percent of every African-American that took that Captains test failed it. Sixty-two-and-a-half percent of every Latino that took that Captains test failed it. Sixty-eight of every African-American that took that Lieutenants test failed it. And there's one. Seventy-eight-and-a-half percent of every Latino that took that Lieutenants exam failed it. If those aren't – if

those results are statistically insignificant, then I don't know what statistically insignificant mean.

In 1996 – 1999, you had a Captains exam. A white male came out Number One. A Latino male came out Number Two. And a black male came out Number Three. In 1996, almost – in 1996, with the Lieutenants exam, almost similar results. White male came out Number One, African-American male, Three, Latino male, Four, in '96. '99, one, five and one. The top one.

Every test prior to this one, African-Americans and Latinos have done well, not as well as we'd like, but they've done well. They placed high enough to be promoted.

I'm not saying there's nothing wrong with the process. But there was something inherently wrong [34] with this test. And I think what this Commission has to decide is whether it's better to spend $100,000.00 to throw out this test than hundreds of thousands of dollars trying to fight a test that is statistically significant.

They talked about the Uniform Guidelines. And the Uniform Guidelines in Section 3, Subsection d, talks about adverse impact and the four-fifths rule. These – these percentages of the African-Americans that took – and Latinos that took and failed this test fall well within the purview of Section 4, Subsection d, of the Uniform Guidelines that deal with adverse impact.

In fact, 74 percent of everybody that passed this test were white males, 17 percent was African-American, 8 percent was Latino.

She also talked about a lawsuit. As President of my Local organization, in 1996 we sued the City of Bridgeport for having the Lieutenants exam that had – that we felt had adverse impact. And we won that lawsuit. So, you know, there's history on the side of dealing with lawsuits as far as adverse impact are concerned, with our case setting a precedent as far as that's concerned.

On behalf of the Northeast Region, on behalf – and let's go one step further. Let's take race [35] out of the picture. Out of 40 – 42 – no. Out of 77 individuals that took that Lieutenants exam, 42 failed. Over 60 percent of those individuals that took that Lieutenants exam failed. Now, that says that – New Haven has one of the best-trained divisions in the state of Connecticut. And that says a lot about that exam if 60 percent of the individuals that took that Lieutenants exam failed.

Just – in Bridgeport – I'm a retired Captain in Bridgeport. In Bridgeport, we have 67 Lieutenants, 46 white, 13 black and 8 Latino. That's 32 percent of our Lieutenants are people of color. In the Captain rank, we have 15, 10 white, 2 African-American and 3 Latinos. That's 33-⅓ percent of every Captain in the Bridgeport Fire Department is a person of color.

Now, what are we doing right that New Haven in this last test didn't do right? I'm asking, I beseech you

to throw away that test. Talk to Jack Colligan, who is Director of Civil Service in Bridgeport, to find out what Bridgeport is doing different than New Haven.

When we go in there to take the test, we all read the same books. We have the same assessors. We're asked the same questions. With the Captains exam [36] that I took, African-Americans and Latinos took four of the top seven positions. With the last Lieutenants exam that we took, 48 percent of every Lieutenant that was promoted off that list was African-American or Lieutenant – I mean African-American or Latino. So we're doing something right.

And I can tell you this last test was inherently unfair. Again, I ask you not to certify this list because it's the right thing to do.

MS. FRANCINE HARCOURT CAPLAN: Thank you, Mr. Day. I just want to ask you something. Do you think that – what happened after that in Bridgeport? I'm curious to know what happened after the – after the test. Yeah.

MR. DAY: Well, Bridgeport ended up changing the process. They changed the relative weights on the test. Before, we had a written and an oral. The written was scored as 70 percent, the oral was 25 percent and 5 percent seniority. The City of Bridgeport understood that an individual's ability to answer a multiple-choice does nothing but measure their ability to read and retain.

The thing that separates whether you're going to be a good officer or not is your ability to [37] score well on that oral. That oral puts it – deals with scenarios, real-life scenarios. What would you do in a particular situation? What would you do if you had a problem in your house?

So they changed the relative weights of those tests where the oral is scored 65 percent of your test, 35 – 30 percent for the written and 5 percent of the oral. Then it was encumbent upon us to share our resources, start studying together and make a concerted effort to do well on these things. And that's who we were able to change it in Bridgeport, turn it around.

Other than that initial lawsuit in 1986, we've never had to sue the City of Bridgeport on a promotional exam ever again. We've never not been fairly represented on a promotional exam since 1986. But I – we can't – I know the Commission. We said that we can't make a decision based on who is going to have a lawsuit against the City right now.

MR. DAY: Right.

MS. CAPLAN: That's not – we're here to find out, as our Chair person has said, whether this test, as some have indicated, did have problems. And that's why we do probably, most definitely, need to speak to an expert. And we understand both sides of the issue [38] here and are going to make as best a decision as we can based on everything we hear.

* * *

[60] MR. GARY TINNEY: Gary Tinney, New Haven Fire Department.

MS. TIRADO: What's your first name again?

MR. TINNEY: Gary Tinney.

MS. TIRADO: Gary.

CHAIRPERSON SEGALOFF: Mr. Tinney, just for the record, Barbara Tinney is your –

MR. TINNEY: My sister.

CHAIRPERSON SEGALOFF: – sister. Right?

MR. TINNEY: Yes.

[61] CHAIRPERSON SEGALOFF: Okay.

MR. TINNEY: And she's – it's the last thing she's worried about. She did have surgery –

CHAIRPERSON SEGALOFF: Right.

MR. TINNEY: I wanted to say I was a little – I'm a little upset. I'm part of the union. I'm part of the Executive Board of the union. And we had a meeting the other night and I was told – and we all agreed that we weren't going to take a stance on this issue. After listening to the President of the union, he pretty much took a stance on this issue. And I'm upset being a part of that board that I was lied to. We weren't going to take a stance and we were just going

to ask that someone from an outside party look into this and look into the validity of the test.

One of my major concerns – other than that, one of my major concerns is a lot of this test – and I mentioned it before – had nothing to do with the City of New Haven Fire Department operations and it contradicted what we were taught or at least what I and numerous other firefighters were taught throughout our careers.

And when you receive a test and it asks all of these different questions and you're asked to [62] answer it the department's way or the way these books – these books that a few of them are based on New York operation. They're confusing.

I think the test was flawed. I think the test was flawed because it didn't pertain again to our operations. Another issue of importance was the fact that people had these books before the syllabus was handed out. Numerous firefighters had these books and they were studying them hard. Not the books that we have in the fire houses. In the fire houses, we have a book called Essentials of Fire Fighting. I think if we were given the test on promotional exams, it should be on the test that we all have access to – books that we have access to, books that are in our fire houses, books that are in our Training Academy, books that are – we receive memos every month. Read this particular memo. Read this particular memo, based on the Essentials book. Nothing is based on these books, these Norman Clark, all these new

New York books that came out of wherever that no one had a clue about what they were talking about.

And I just think it's unfair to – I studied, personally. I studied a long time. I'm sitting up here. I listened to all these sob stories and what people were going through. I could run that to you, too. [63] But I won't. I studied and I think I have a good grasp on what my job is. And I'm pretty sure I'm well qualified to be a Captain of this New Haven Fire Department.

But I honestly feel that the questions on this test weren't relevant to what we were taught. And I think that's the main thing that has to be looked into.

And the other thing is the fact that people had these books a long time before that syllabus was given to us and say, "Go out and buy these books." I ran out, bought my books, ordered my books. I had to wait a month and a half for some of the books because they were on back-order. But numerous people – I'm not going to say any name – had these books. They had access to these books. They were seen studying these books. And they weren't seen – and they knew for a fact that Essentials – a lot of things from the Essentials of Fire Fighting wouldn't be on this test.

We had a gentleman stand up in our meeting the other night, union meeting, and state, "Oh, I talked to the guy from I&O Solutions. He pretty much told me the Essentials wouldn't be on there." And the fact that I go to fire classes, I picked up on the fact that these other authors were going to be on this test and not [64] Essentials. And we spoke for a long time.

And I want to understand why this guy would come in and talk to this man and tell this man that we weren't going to have these particular books on this test and he came to my fire house, he didn't give me any clue as far as what he was going to – you know, what this test was going to pertain to. He just asked what was – what did we think was pertinent to the test-taking process.

The folks that gave us the test, I don't think they've ever tested on promotional tests. I might be wrong. I think they've done entry-level testing. And I just don't – I just think they were throwing a group of books and said, "Hey, make the tests up. Whatever happens happens." And that's it. I don't they sat down and actually communicated with anyone from the department, with – they might have communicated with one or two. But they really needed to sit down and see what was pertinent to the New Haven department's policies.

And I think if you look at this book, you look at the questions, you will see, because there's numerous questions that have nothing to do with New Haven Fire Department. Totally irrelevant. And it's bright as day. It's right in front of you. And those questions [65] are the questions I have a concern.

CHAIRPERSON SEGALOFF: If you would, Mr. Tinney, help me on one issue or give me your thoughts. Even though we might find or conclude that certain questions were irrelevant – the question that we've heard time and again, "Where do you park the

truck, uptown or downtown?" We sit here and we say, "What a stupid question." But isn't one reaction of that that stupid question doesn't necessarily affect anybody's cultural background, history, et cetera. It's stupid whether you're Hispanic, whether you're African-American or whether you're white. So should we consider throwing out a – I'm just –

MR. TINNEY: Right.

CHAIRPERSON SEGALOFF: – going on here, but trying to understand this. Should we – how people feel. Should we consider throwing out the exam or not certifying the eligibility list if the best we can conclude is there were a bunch of stupid questions like that but it –

MR. TINNEY: Well, the thing – with the stupid questions I spoke of, if you had people that had these books and know these authors well – these books are – the people that have these books are uncles, [66] nephews, kids from people that have been in the Fire Department for years. Personally, I never had these books. I never had anyone that was a grandfather or uncle or anybody. I grew up in the city of New Haven. I've been in New Haven all my life. And these books have been read and known for a long time before this test came out.

And what I don't understand is why would they take and change the whole way of testing and give us another test on this – this I&O Solutions, who we never used in the promotional test, give them an opportunity to do something that they – I don't think

they had a clue that they knew what they were doing with a promotional exam. There's a big difference between promotional and entry-level exams. And with promotional exams, you really need experience on dealing with diverse cities and dealing with the makeup of the city and what's important to the city.

I heard the gentleman speak of the tankers on the highway and things like that. Guess what? A lot of those questions weren't up there. They were in the books, but they weren't up there. Things that were important to our operations weren't up there.

And what I'm saying is someone who had [67] material before the test, reading material, and who understood these authors would do a lot better on this test than people like myself that these were new authors to me.

MS. CAPLAN: Mr. Tinney, were these questions that you said are flawed on both the oral and the written or just the written?

MR. TINNEY: Most of the questions I'm speaking of are on the written. Some of them were on the oral, also. But most of them – I mean there were irrelevant questions on the oral. But there were a lot on the written and the oral. I just don't think anyone sat down and gave these guys a good idea of how to do the testing in all fairness to everybody. You know, I feel for everybody, everybody that studied and everybody that scored high. You know, I understand. I understand both sides.

But in all fairness, when we took that test and we walked outside, when we took that Captains exam, black, white, Spanish, Puerto Rican, everybody was outside and all of us were upset. We couldn't believe the questions on the test. And everybody stood around and said, "I don't think I passed. I don't think I passed. I don't think I passed." And guess what? When [68] they found about the list and where they – where the blacks and the white and everyone stood, everybody's view changed.

And then tonight with the union standing up and telling me they're not going to take a stance and then they took a stance is –

CHAIRPERSON SEGALOFF: Okay. Anybody –

MR. TINNEY: Is bad.

CHAIRPERSON SEGALOFF: Thank you very much, Mr. Tinney.

* * *

[89] MR. DAWSON: My name is Octavius Dawson. I've been with the New Haven Fire Department – I'm in my seventh year. I was born here. I was raised in West Haven. But after I joined the Fire Department, I moved into New Haven. I bought a home on Six Eldridge Street in New Haven.

And one thing that does concern me or bothers me – and, also, I – after – straight out of high school, I joined the Service and I served in the first Gulf War

in '91. And one thing that coming through the ranks in the Service was how promotions were done. And I disagree with the way promotions are done altogether. But these are the rules. This is what we go by.

I, myself, did a little research to try and figure out, you know, as a department, the face of [90] the department as opposed to the community. And whereas whites make up 30 – 43 percent, blacks make up 37 percent and Hispanics make up a little under 20. But within our department, whites make up 59 percent, blacks make up 29 and Hispanics make up 13.

And, again, you know, times are changing. You know, we're hopefully going to make strides to, you know, even that out. And with the best qualified individuals.

I also looked at officers in our department. And it bothers me a little bit that 70 percent of our officers in the New Haven Fire Department are white. 70 percent.

Now, I hear people talking about you get the best qualified people. Are you going to tell me that all of our officers – there aren't any others that can change that? I looked at the – I was on the department in '99 when they made the last list of promotions. And I was very pleased – and I was ineligible to take it. I was six months shy of being able to take that exam. And I was very pleased to see that we had blacks and Hispanics that made the rank of Lieutenant. Very pleased.

And I questioned everybody. "Hey, how was [91] the test? How did it go?" You know, with the reading material and everything – and I felt good coming in to this exam. And as Mr. Tinney said and as Dr. Kimber stated, the rules changed. All of a sudden now, we get all these other books that I had no access to. There were individuals in the fire house that had these books, as Mr. Tinney stated earlier. I purchased the Essentials Book of Fire Fighting. And that, I thought and was told, that that is basically the bible of the fire department.

Why on this test was it thrown out? Why? All of a sudden now the rules did change. All of these different books, all this – and the – you know, I went into it saying, "Hey, listen. These are the rules. I'm going to abide by them."

But now as the results come out, no blacks and Hispanics? Why were the rules changed? And as I stated before, I purchased the Essentials of Fire Fighting book months before – once I heard the rumor that there would be a promotional exam, I bought this book, bought the CD-ROM, bought the workbook, and tried to give myself a leg up on it. But as time came down, the word was – and I would be reading in the fire house. I was studying. "That's not going to be on the exam."

That didn't discourage me. I kept [92] reading. As time came closer, "That's not going to be on the exam." Then when the syllabus came out and it wasn't there, now I'm saying, "Well, wait a minute. If

you know what's not going to be on the exam, maybe you do know what is." Because other guys were looking at these other books, you know, that I never seen before.

And as Mr. Tinney stated earlier, when you see 99 percent of minority firefighters – we're first-generation firefighters. You know, a lot of my Caucasian counterparts, they've come into the fire houses when they were little kids. They've come into the fire – they've seen different study material. They went to all the New York fire houses in which all this material is coming. They met John Norman. They've met Randy. And they've been to their seminars.

This – if you look at the results, something's wrong. If 70 percent of your officers are white, something's wrong. I heard this gentleman say that you want the best qualified guy there in the front seat. We all gasped – we watched Good Morning America and there was one firefighter that saved another one, went into that building. You're going to tell me that he's not qualified to be an officer? Something's wrong. Something's wrong if 70 percent of your officers are [93] white.

And if you do this again in another three or four years where you only promote seven or eight officers and you pit 44 Caucasians against 15 or 18 blacks and change the rules again – now, I've got these pile of books. I've been reading them. Ever since the test was over, I've read them. I've been reading them over and over and over. Now come the next exam, the rules

are going to be changed again. That's what I'm anticipating.

So what do we do? I mean I'd hate to be in your spot. I don't know what to do. I mean I – the guys that did study and put the time in and got the good grades, I applaud them. They did a good job. I'm a competitive person. But to look at that list and not see any minorities, something's wrong. Something is wrong when you've got 70 percent of your officers white. Something's wrong. You've got 43 percent of whites in the community, but they make up 70 percent of the officers? Something's wrong.

And, again, I mean you have a tough job ahead of you. You know, I – I've been looking at the books, trying to figure out – you know, I believe that I did fairly well, I believe I came in the top 20. I [94] believe that. But something's wrong. And that's – that's where I'll leave it.

CHAIRPERSON SEGALOFF: Thank you very much, Mr. Dawson.

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VERBATIM PROCEEDINGS

VERBATIM PROCEEDINGS

CITY OF NEW HAVEN
CIVIL SERVICE COMMISSION

IN RE:
FIRE CAPTAIN AND LIEUTENANT
PROMOTIONAL EXAMS

FEBRUARY 11, 2004

KENNEDY MITCHELL HALL OF RECORDS
200 ORANGE STREET
NEW HAVEN, CONNECTICUT

* * *

[96] MS. BURGETT: With all due respect to our consultant who we've worked very well with, it seems to me that one issue, the only one in all of this, is whether or not the questions in and of themselves were neutral questions. It is not the only question that is [97] involved in assessing this test and the outcome as you have seen the raw data.

And part of bringing some expertise to this table is to get a more comprehensive understanding of those issues. So that, for instance, the names that we submitted to you this evening may not be industrial

psychologists, but they are experts in the field of assessment. And several of them have written rather extensively on racial identity and assessment.

So that I would encourage you not to limit the focus to the questions where all of us at this table – Chad has said we could evaluate, but to understand that is only one segment, one piece of a much more overall comprehensive question.

CHAIRPERSON SEGALOFF: Anybody else?

MR. WEBBER: Well, I – I really endorse what Tina had said. I feel that we each will look at this test. We'll each make our own judgment of the questions. And then I'd like to hear somebody, a psychologist or someone of the caliber of the persons here, that any of the questions we have questions about can be submitted.

I would hesitate – and I agree. Tom, I agree 100 percent that to go to any other fire department [98] and bring someone in to look at the test would be very dangerous. I would not trust the judgment, unless I really knew the person in the kind of detail we're not going to be able to get.

MR. UDE: If I could just –

MS. CAPLAN: Go ahead.

MR. UDE: Along that same line, there are things other than just the individual questions themselves. And I'm certainly not an expert in the field or in a position to articulate or identify what those are.

And I guess it's been clear from the outset that this board has been concerned about being very careful about the decision that you're making and appreciate the importance of it all to all of the people that took these exams.

And I guess I just want to caution you to I guess keep an open mind to what other experts may have to add, both specific to this test and in general ways, if it makes sense to you. I mean, obviously, ultimately deciding whose opinions you think makes sense is what you're charged with doing. But –

MS. CAPLAN: But just one more thing. Tina, are you saying that – this is what I wanted to get clear. These experts or some of these experts may not [99] only talk about the specific questions of this test that they're looking at, but they also have opinions on tests in general and the biases that may be in them?

MS. BURGETT: Yes.

MS. CAPLAN: But then why – why hasn't – why just this test? Has this – I mean this is what's gnawing at me. Why are we looking more into this test? Is it because of the results? Because – but then what happens with all the other tests? Because if there's, in general, biases in every test, then why wouldn't there be biases in every single test the City gives to everybody?

MS. BURGETT: I think what we tried to present to this board several weeks ago was not just

information on the overall test but the results of that test in terms of distribution and that what we saw from our vantage point in Human Resources was dramatically different. I don't know that looking at the questions in and of themselves is going to answer every answer. And so all I'm asking for is consideration of other individuals with expertise in assessment, in testing, racial identity and other kinds of concerns.

We may decide we don't want them to look at the test. We just want them to, you know, provide some expert testimony. And that's fine. We may want [100] them to look at the test. And they would fall under the same rubric as you and sign a confidentiality agreement.

I just want to urge caution that we not step away from that there is a larger picture to be looked at, not just simply the facial value of the hundred questions in the written exam and however many there were on the oral exam.

MR. UDE: In response to the Commissioner's inquiry, the reason that the results of this exam is before you and the reason that these proceedings have been going on is that the results of this exam are significantly different from the results of the other previous exams. As to why that happened on this case, on these exams, and it didn't happen on other exams, I don't have an answer. And I don't know that anyone in this room, frankly, would be in a position to give you a definitive answer.

Nevertheless, when you have an adverse impact, it requires a closer look and a decision as to – as to what to do about it, whether to certify, not certify, something else. I don't have the answer for what to do. But it does require a long, hard look.

And I think it would be in the board's interest to try to get as much information on what may [101] have resulted in it in order to make the most reasoned decision that we can make.

CHAIRPERSON SEGALOFF: I think that's exactly what we're trying to do. But I'm not sure why – I don't think any of us question that necessarily. But that's precisely what we're trying to do. I mean that's why we said we want names of people. That's why we're asking people if they've got other names. So we can get people up here who know what they're talking about, having some expertise and keep looking at this.

I would only say one other piece. And that is that from what I can gather the three or four names that you gave us don't have – they may be very, very valuable. I mean they want all of them. But it seems to me that there also may be some value in bringing someone in, at least in listening to Chad, who also has that experience with dealing with fire and police. So I mean in the ideal world if you could find us another – come up with some names of someone who has that experience, that would just personally give me a little more comfort. And that's some more –

MS. BURGETT: Noelia and I are happy to go back –

CHAIRPERSON SEGALOFF: – testimony to [102] evaluate.

MS. BURGETT: – and discuss that. We will go back and discuss it.

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VERBATIM PROCEEDINGS

CITY OF NEW HAVEN
CIVIL SERVICE COMMISSION

IN RE:
FIRE CAPTAIN AND LIEUTENANT
PROMOTIONAL EXAMS

MARCH 11, 2004

KENNEDY MITCHELL HALL OF RECORDS
200 ORANGE STREET
NEW HAVEN, CONNECTICUT

[2] . . . Continued Verbatim Proceedings of a Hearing of the City of New Haven, Civil Service Commission, In re: Fire Captain and Lieutenant Promotional Exams, held March 11, 2004, at 5:45 P.M., at the Kennedy Mitchell Hall of Records, 200 Orange Street, New Haven, Connecticut . . .

CHAIRPERSON JAMES SEGALOFF: Okay. Good evening, everybody. As most of you know, I assume, we looked into a number of people whose names were presented to us to give us some testimony and some insight into some of the issues we've been dealing with. And we selected three people. And they're – two of them are here with us physically today and Dr. Hornick is in – Texas?

MS. FRANCINE HARCOURT CAPLAN: Colorado.

CHAIRPERSON SEGALOFF: Colorado. Aurora, Colorado. And we're going to do this by phone with him. And then we'll talk to Mr. Lewis and Dr. Helms.

As you all know, everybody, this is not a [3] it's open to the public, but we are not opening this to questions to the public. We – as far as a format, our sense is – we'll see how this all plays out – is to essentially have each one of these ladies or gentlemen tell us a little bit about themselves as it relates to the expertise that they can – they have in this area of testing or their experiences. And then we will ask them, from the information we've imparted to them, to tell us a little bit about their views of the testing, the process, the methodology, et cetera. And then the four of us, if we have any questions, will ask them of the participants. So that's our – that's our plan. And we'll see how this all plays out.

So we're ready.

MS. CAPLAN: Okay.

MS. TINA BURGETT: In the spirit of high-tech, let me crawl over there. Sorry.

CHAIRPERSON SEGALOFF: How this will all come out, if you could all hear, we just don't know.

MS. ZELMA TIRADO: And Dr. Hornick did read – did see the exam?

MS. BURGETT: Yes, he chose to.

CHAIRPERSON SEGALOFF: He did what? He read the exam?

[4] MS. BURGETT: Yes.

CHAIRPERSON SEGALOFF: Yeah.

(Placing phone call)

MS. BURGETT: Hi, Simone. This is Tina. Is Chris available and ready? We are ready. I'm going to put you guys on speakerphone. Okay. Thank you.

MR. MALCOLM WEBBER: Is he on?

CHAIRPERSON SEGALOFF: Hello?

Not yet.

MS. BURGETT: We lost him. Did we lose him?

MS. CAPLAN: Yeah. You'll have to redial.

MS. BURGETT: Do you want to press Redial?

MS. CAPLAN: See if it works. Yeah.

(Placing phone call)

CHAIRPERSON SEGALOFF: Hi. Is Dr. Hornick there please?

SIMONE: He's on the other line (indiscernible)

CHAIRPERSON SEGALOFF: I hope he's not on the line that we're on. We're with the Civil Service Commission. Can you put him back – get him on this line and see how that works?

SIMONE: Okay.

[5] CHAIRPERSON SEGALOFF: Thank you.

MS. CAPLAN: See the speakers? The speaker –

CHAIRPERSON SEGALOFF: Who is your high-tech person here?

MS. CAPLAN: But look at the cord –

CHAIRPERSON SEGALOFF: I don't have a clue.

MS. CAPLAN: See? This is a speaker.

MS. BURGETT: There.

MS. CAPLAN: She disconnected again. No. No. I put Speakerphone on and that's –

CHAIRPERSON SEGALOFF: If we don't get this – we are going to get some participation from this group.

(Placing phone call)

MS. NOELIA MARCANO: Leave the phone off the cradle and just –

MS. BURGETT: Hi, Chris. This is Tina. We're going to try you on speakerphone. And I think it will work this time. Sorry for the confusion.

MS. MARCANO: Leave the phone off the cradle.

MS. BURGETT: Okay.

[6] MS. MARCANO: And now put the microphone up to –

MS. BURGETT: The speaker.

MS. MARCANO: Right.

MS. BURGETT: Chris?

DR. CHRISTOPHER HORNICK: Yes. I'm still here.

MS. BURGETT: Okay.

CHAIRPERSON SEGALOFF: Okay.

MS. BURGETT: Let me introduce you to the Civil Service Commission for the City of New Haven. The Chair is Mr. Jim Segaloff. And he'll open.

CHAIRPERSON SEGALOFF: How are you, Dr. Hornick?

DR. HORNICK: I'm doing just great.

CHAIRPERSON SEGALOFF: All right. Great. This is coming across I think as best as we can expect. And everyone, at least on our end, here can hear it.

We've got four Commissioners, Francine Caplan, Zelma Tirado and Mal Webber. And we thought we'd start off if you could just give us a little bit of background about yourself and your experience and your testing area and any specific experiences you've had dealing with municipalities, particularly fire and police [7] departments.

DR. HORNICK: Sure. I'd be happy to do so. I received my PhD in 1979 from Texas Christian University. My degree is in psychology. My emphasis was in statistical measurement and industrial/organizational psychology. And I've been practicing in my consulting business since 1980. So that's almost 25 years. And we have worked almost exclusively in the public safety arena.

We do entry-level and promotional testing procedures for clients all over the country, doing both law enforcement and firefighting selection. We work with counties. We work with municipalities. We've worked with several police and state agencies. For example, we just developed and conducted the entry-level selection process for the Rhode Island State Police. We've worked with the Pennsylvania State Police and many, many others.

A little bit about some of the things that I guess would describe us and me. We have been recognized by our profession as – we were given the highest award from our profession for innovative procedures in the area of applied psychology, in essence, recognizing us with a lifetime award for the work that we've

done in entry-level testing in firefighting and in [8] law enforcement. They examined some research that we had done with our entry-level test and identified our research for this highly prestigious award.

I've also served as an expert witness in several court cases. I have served to help municipalities defend testing or selection procedures that others have created. I've never had any procedure in 25 years that I have designed or conducted be challenged legally. But I have been asked on many occasions to serve as an expert to help cities to defend procedures that others have done or that they themselves have done.

But I've also served as an expert in evaluating selection procedures from the plaintiff side. I've served as an expert for unions in a couple of instances where the procedures that we were arguing with a particular municipality didn't meet the standards and asked if I might weigh in on some of those issues.

I have also served as an expert with the Department of Justice on behalf of the United States in a landmark case of discrimination regarding – in this particular case it was specifically focused on firefighter entry-level selection.

So we have a pretty broad-based level of [9] experience with these kinds of issues. I think if I could say in a sentence, we are probably best known for our ability to be able to forge partnerships and build bridges between I guess I would say concerned parties. I'm quite aware from the information we've

been sent that right now we're in a fairly contentious environment in New Haven and there are a lot of people who have certain belief systems that are impacting how these test results are being viewed. And it tells me, based on what I've seen, that there needs to be some bridge-building here because no one, I don't believe, intentionally tried to create a problem. But there are issues that I'm sure in the next hour we're going to be talking about.

CHAIRPERSON SEGALOFF: Let me just ask you this. Have you had experience dealing with communities that are somewhat similar to New Haven in terms of demographics?

DR. HORNICK: Oh, absolutely. We've worked –

CHAIRPERSON SEGALOFF: Could you tell us a couple of those communities?

DR. HORNICK: Sure. We work a lot in the Atlanta region. There are several large counties down there that have similar demographics to yours. We have [10] worked, as I said, with the Rhode Island State Police and with Pennsylvania State Police.

CHAIRPERSON SEGALOFF: Okay. You've been given some information, from what I understand, regarding the situation here in New Haven?

DR. HORNICK: Yes. We have quite a bit of information.

CHAIRPERSON SEGALOFF: Okay. My sense is, simply as an open-ended question – if you just want to speak to some of the issues that jump out at you and give us your particular views as you see they would be useful to us in pursuing this question of whether or not to certify this eligibility list?

DR. HORNICK: Okay. Unfortunately, this is kind of being viewed as an all-or-none decision. And I do believe that there are some other ways over time that we can address this more effectively.

Ultimately, what we were sent were some statistical information, if you will, final scores, for applicants. I believe there were 77 applicants who took the Lieutenant's exam and 40-something that took the Captain's exam. And we were given the final scores on each of the two test components, the oral board and the written test, for each of those two groups. And then the [11] computation of the final score, which, according to my understanding, the weighting and combining of those scores is dictated by the Civil Service Rules. Is that correct?

CHAIRPERSON SEGALOFF: Yes.

DR. HORNICK: Okay. Very briefly, what we did was do some standard statistical calculations on that data to determine what type of adverse impact existed in the test scores with regard to ethnic minorities. Because there were, I think, only two females in the group, it was impossible to look at women's performance in a group analysis. So we did not look at that.

And I certainly could go into some of those statistical analyses. But if I could just summarize what we saw, we're seeing relatively high, adverse impact. And let me define that because, for the sake of everyone involved, we may not all have the same understanding of what we mean by adverse impact.

In our profession and in the legal community, we identify a concept called adverse impact which statistically determines how well minorities perform on a testing procedure in comparison to whites. Normally, whites outperform ethnic minorities on the majority of standardized testing procedures. This is, in [12] fact, the case with the data that we've seen in New Haven.

I'm a little surprised at how much adverse impact there is in these tests. And I hope at some point here we'll be talking in detail about that. But my conclusion is that we did have significant adverse impact. Some of it is fairly typical of what we've seen in other areas of the countries and other tests that people have developed. But in other ways it is somewhat worse than what we're typically seeing in the profession practiced by others.

I would add that we are a – well, let me put it a bit differently. We have competed with the consultant that you chose to do this process in other arenas and other areas of the country. So we are a direct competitor of theirs. And I want you to understand that I'm not attempting to accuse or attack I/O Solutions in

this process. I'm simply reporting what that data shows.

We find significantly and dramatically less adverse impact in most of the test procedures that we design. But I'm not sure that's a fair comparison if you want to look at it in terms of what's typically done by other companies in our profession.

[13] Let me stop there maybe and see what else I can do here. Because I could go on for a long time here.

MS. CAPLAN: Dr. Hornick?

DR. HORNICK: Yes?

MS. CAPLAN: This is Francine Caplan. Did you get a chance to – beside the statistics that you looked over, did you get a chance to look over the actual test?

DR. HORNICK: No. I have not had time to study the test at length or in detail. We received these by Federal Express about mid-morning today. I have looked through them and looked a little bit at them. But I have not done an in-depth analysis of any of the specific items or pieces of that.

CHAIRPERSON SEGALOFF: And you understand we can't discuss in open session here any specific questions. Were all subject to confidentiality agreements. But we certainly can discuss if you think its useful in a general sense the nature of the

questions or the results certainly from the answers to those questions.

DR. HORNICK: Sure. On a broad scope, the adverse impact on the written exam was somewhat higher [14] but generally in the range that we've seen professionally. I don't want to go into a specific statistic because I think I'm just going to lose most people. But there is an index that is typically calculated that compares the average performance, for example, of African-Americans compared to the white population or Caucasian population that took the exam. You can also compare Hispanics or Latinos to that white population. That statistic is called a "D", as in dog, statistic. And it shows numbers that are at the high end of what we have seen with traditional cognitive testing elements.

The oral board had much higher adverse impact, if you will, against the Latino population that took the exam than I would have expected to see. And I think in comparison to some of the tests in the past, you probably have seen less from some of the data that I saw. I don't have any specific information from previous years. But I think you all are a bit surprised as well that it had as much adverse impact as it did.

CHAIRPERSON SEGALOFF: So let me ask you this. How do you explain the adverse impact concept maybe generally? And then specifically, how do you explain the fact that the adverse impact here, from what [15] you've just said, seems to be more dramatic than what you've seen in other situations?

DR. HORNICK: I'm not sure that I can explain it. What I would say is you are wedded at this point to test components. For example, I believe – and I have not seen your Civil Service Rules. So I apologize for my ignorance here. But I believe that your Civil Service Rules dictate that you must administer a written job knowledge test as one element in this promotional process and that you must administer an oral board of some sort, a structured oral interview, as a second component. Is that correct?

CHAIRPERSON SEGALOFF: I assume that's so. I know 40 percent of the test score was related to the oral piece and 60 percent to the written.

DR. HORNICK: Right. Well, first of all, let's talk a little bit about why I think there is adverse impact in the test. One of them is I think you ought to look as an agency, as an organization, as a community and as a department at perhaps different types of testing procedures that are much more valid in terms of identifying the best potential supervisors in your fire department.

For example, for Lieutenants and Captains, [16] it is a first-level and second-level supervisory position. The Captain and Lieutenant are fairly common overlapping knowledge, skills and abilities that are required to perform in them.

I've spoken to at least 10,000, maybe 15,000, firefighters in group settings in my consulting practice and I have never one time ever had anyone in the

fire service say to me, "Well, the person who answers – gets gets the highest score on a written job knowledge, multiple-guess test makes the best company officer." We know that it's not as valid as other procedures that exist.

However, given your Civil Service Rules, you are somewhat tied to that procedure as the process that you must use for identifying people for promotion.

But there's a couple of observations I could make, not specific to the test itself and items in it, but to the process that you have used. I noted in the literature that Tina sent that the test was not customized to the New Haven Fire Department, Fire and Emergency Medical Services.

A VOICE: Yes, it was.

CHAIRPERSON SEGALOFF: Actually, it was, Dr. Hornick. I don't know what you got. But we did – [17] the I/OC group did customize it, based on the information we have, that they – sent questionnaires to all the Lieutenants and Captains and dealt – and I've got a – well, that's – everything that we've got here shows that in this case it was customized. Unless I'm somewhat mistaken.

MS. TIRADO: Well, is it his opinion that it wasn't customized? Or is –

CHAIRPERSON SEGALOFF: The question was, Dr. Hornick, is it your opinion it wasn't customized or was that just –

DR. HORNICK: It's based on several things. Your procedure apparently be design precluded anyone from within the organization reviewing the test items.

MS. CAPLAN: Say that again?

DR. HORNICK: You had no internal members of the department, subject matter experts from within the department, reviewing the test content. And in some of the newspaper articles and other things we noted there were several criticisms by candidates levied about items not being relevant to the department.

By not having anyone from within the department review the items you inevitably get things in [18] there that test for processes and procedures that don't necessarily match up into the department.

MS. CAPLAN: But you didn't – you didn't get – you weren't able to take – did you take a look at some of the questions on the test?

DR. HORNICK: Not at that level. So I'm only drawing conclusions from what I've read and the material that I've received. But let's not worry about the – maybe it's the term "customized" that is bothering all of you.

The bottom – the bottom line of what I'm trying to say is that there are different reasons for why the adverse impact occurs. And I suspect that some of the criticisms that have been levied by candidates to the

test may or may not bear fruit when one looks at the actual items.

If – in my own consulting practice, we like to have a panel of subject matter experts from within the department who have signed confidentiality agreements to actually look at the items to make sure that the terminology and the equipment that's being identified from standardized reading sources apply to the department. So I think that might be one concern that we have.

[19] I think there are probably several other issues that are much more in-depth than this discussion would allow, to talk about why we traditionally see adverse impact in tests.

MS. TIRADO: Did that happen? Did fire department personnel have an opportunity to look at the test?

MS. MARCANO: No. There was no internal subject matter expert review. The internal data came by way of job analysis interviews and job analysis questionnaires that were distributed to the department.

CHAIRPERSON SEGALOFF: What was done here, from what information we have, by the consultant in preparing this exam was that he started out with a – or used a job analysis questionnaire which they had developed and apparently provided to all the Lieutenants and all the – the sitting Lieutenants and sitting Captains and got

back, as I under – from what I can see here, a response from most of them. And then he went outside of at least the New Haven area, in one case to – outside of it, to Atlanta, in another case to a city apparently north of Connecticut.

I guess what I'd like to hear you say or hear your opinion – is that – other than the fact that [20] maybe there should have been, in your view, some more input, if you will, from the local people, what else do you see maybe could have been done differently that would have – and would it changed – in your opinion, changed the result here, this adverse impact that we've got?

DR. HORNICK: Would what have changed my opinion? Within your procedure –

CHAIRPERSON SEGALOFF: We possibly – if we had done what you suggested – and I'm not – believe me, I'm just – we're just trying to get a sense of your opinion. I'm certainly not trying to trick you. But what I'm trying to understand is that from what I heard you say is that it – one thing that appears to you that did not happen here is we did not get local participation in the sense that you've maybe seen it in other communities in developing the test. Is that – is that right?

MR. WEBBER: A fair statement?

DR. HORNICK: That's an example. I'm not saying that that caused it.

MR. WEBBER: Okay.

DR. HORNICK: Adverse impact in what we call cognitive skill testing has been in existence since the beginning of testing in our profession. There are – [21] there is information and literature out there that has helped to identify ways to minimize some of that. But it's going to – it would be very difficult for a psychologist, even someone like myself, to look at each individual item and say – let me put this differently. There's an outdated term in psychology called face validity or facially neutral evaluations of tests. And when one looks at a test and tries to figure out if the language has some bias in it, that's a very difficult thing to evaluate. And it's not a very crucial process to go through.

What I think we ought to be ought to be talking about here is the broader issue of how your procedures and your rules and the types of tests that you are using are contributing to that adverse impact. I'm not suggesting that I/O Solutions somehow created a test that had adverse impacts that it should not have had.

MS. CAPLAN: Well, Dr. Hornick, obviously the future – we're going to have to look to the future. The City will have to look itself. But right now as a Commission, we have to deal with this particular this and whether to –

CHAIRPERSON SEGALOFF: Certify.

MS. CAPLAN: – certify it or not. So I [22] guess what we want to know from you – and you said you didn't read every single question. But – but what

are you actually – what is your conclusion when you say about the adverse impact and that you felt it was a little bit more severe. What is your conclusion? Can you give us any conclusion to our particular test? Not so much what we can do in the future, but what we can do – what would your recommendation be?

DR. HORNICK: There are other alternatives to just the written job knowledge that you used in that initial stage and to the oral interview process that I believe would have demonstrated less adverse impacts, that I believe would have increased the likelihood of getting the best candidates at the top of the list so you would have identified the best possible people and you would not have had artifacts in the development of the test that contributed to the adverse impact that you received.

MS. CAPLAN: Well –

DR. HORNICK: I mean, for example, you were not using an assessment center process, which is essentially an opportunity for candidates to demonstrate their knowledge of the, if you will, SOP's, standard operating procedures, to demonstrate how they would [23] address a particular problem as opposed to just verbally saying it or identifying the correct option on a written test.

For example, there's concepts of situation judgment tests that can be developed and designed, customized within organizations that demonstrate dramatically less adverse impacts that are very well received by candidates that test the ability to apply

their knowledge as opposed to just memorize and give the correct answer from a multiple choice, recognizing what's the correct answer from a particular reading source.

So there's other procedures that I think might serve your needs better.

With regard to the question all-or-none, do we certify the test or do we not certify the test – how does the expression go? You're darned if you do and you're darned if you don't.

The newspaper articles that we have seen indicate that there are threats of lawsuits regardless of what approach you take. I think you need to weigh what your values are and go with the best possible decision.

There is adverse impact in the test. That will be identified in any proceeding that you have. You will have industrial psychology experts, if it goes to [24] court, on both sides. And it will not be a pretty or comfortable position for anyone to be in.

I think what we ought to be doing is perhaps looking at a way to utilize the investment of your resources already. You've done the test. It appears to be a reasonably good test, although it does have adverse impact. So perhaps the only choice you will have in the end is to certify the list as it exists and perhaps only use it for the minimum that's required by your rules and look at a process where all of the different groups can weigh in and be involved in the

decision to look at some other alternative ways to deal with these issues. Rewriting the Civil Service Rules, if necessary, that have everyone's input so that we come up with a process that gives a more valid way of identifying candidates in the future while also minimizing disparities that typically occur between ethnic minority performance on these types of tests and Caucasians.

Does that help at all?

MR. WEBBER: No

MS. CAPLAN: No. We understand all those reasons. And we've ourselves thought about that for the future. But right now we're dealing with what's in front of us. Obviously, Civil Service reform is something that [25] has to be talked about in the future. But we're not dealing with it right this moment. We really wanted to take testimony from you and a few other experts on the test and on disparate results, adverse impact, and particularly this test.

CHAIRPERSON SEGALOFF: I'm wondering if on the oral part, Dr. Hornick – as I understand it, there were three assessors and they were from out-of-state and there was generally an attempt to make one Hispanic, one Caucasian and one African-American sitting as assessors. Do you have any comment on that? Or is there a different way it could have been done or a better way or some other concept that's used? I understood you talked about maybe in some way testing leadership or skills in a – in a little different fashion. But could you help us on that part of the exam?

DR. HORNICK: I think there are other ways to identify those skills. But the composition of your oral boards I don't believe can be called into question. You had – from the information I had received, you had very good diversity in the representation on those panels. And I don't think that's a concern or issue that you have.

But, yes, I think a person's leadership [26] skills, their command presence, their interpersonal skills, their management skills, their tactical skills could have been identified and evaluated in a much more appropriate way that would have tested their real skills and not necessarily their ability to in two-and-a-half minutes describe.

This is a – this is really not the place in this phone call to talk out some of those alternatives. But I think there are much better procedures for you to be able to identify those skills.

But I do not think that the composition of those panels was a problem. No.

CHAIRPERSON SEGALOFF: I – Mal?

MR. WEBBER: Yeah. There's a mixture of administrative expertise and expertise within the fire department fighting fires in the test. Did you think the mixture was correct?

DR. HORNICK: I haven't seen the job analysis data.

MR. WEBBER: Okay.

DR. HORNICK: There were two different tests. Right? One for Lieutenant and Captain. So I'm not prepared to really answer that. If (Indiscernible) of the job analysis and the weighting of the items was [27] done appropriately, then I would guess the weight that the consultant identified would have been the correct one. It appears – and, again, I have not studied these items in any detail. It did appear to have some pretty complex descriptions, for example, for the tactical items, which would make it difficult for someone to really interpret and understand that without other information. For example, pictures to help identify what it is that the words are trying to describe. And maybe that contributed to your adverse impact. That's pretty hard to judge from here in Denver with only having had a little bit of time to look over those actual exams.

Did I answer your question?

CHAIRPERSON SEGALOFF: Sure. Yes. Did you answer my question?

MR. WEBBER: Yes. Yeah.

CHAIRPERSON SEGALOFF: Okay.

MR. WEBBER: What you could do with it.

CHAIRPERSON SEGALOFF: Okay. Any other questions?

We're all set, I think.

MS. MARCANO: I just want to correct for the record that the procedures that Dr. Hornick talked of earlier –

[28] CHAIRPERSON SEGALOFF: You mean the 60/40?

MS. MARCANO: – insofar as 60/40 is not mandated by our Civil Service Rules but an agreement entered into between the Fire Union Local 825 and the City back in the mid-80's that we're still operating under.

CHAIRPERSON SEGALOFF: And that's the 60/40 split for –

MS. MARCANO: Correct.

MS. CAPLAN: Yes.

CHAIRPERSON SEGALOFF: Okay. I think we're all set. Thank you very much. We appreciate that you made yourself available on such a short notice. And we thank you.

DR. HORNICK: Okay.

CHAIRPERSON SEGALOFF: If you'd like to add anything to sum up or any other points of view that you think are helpful, we're happy to hear it.

DR. HORNICK: Okay. Well, I think there are a few things that maybe came through in this. Do you want to talk about recommendations for the future? You seem to want to focus this more on –

CHAIRPERSON SEGALOFF: We're just trying to, at this point, deal with the present.

[29] MR. WEBBER: The present. We've got enough.

CHAIRPERSON SEGALOFF: Which we have to deal with. It might be very helpful once this is all completed that we enter into some discussions about the future. But right now, I think we're just getting through the present.

DR. HORNICK: I certainly would offer any help that I could give you here. I think there's not a lot that we could do at this point on our end other than serve as advice, in an advice capacity if we can. So, again, I think there are some things that we need to look at for the future. And we certainly would like to help you if we can in that regard.

CHAIRPERSON SEGALOFF: Okay. Thank you very much.

MR. WEBBER: Thank you.

CHAIRPERSON SEGALOFF: Good night.

(Whereupon, the phone call was concluded.)

CHAIRPERSON SEGALOFF: Do we have an agenda of speakers in terms of –

MS. CAPLAN: Yeah. Here it is.

MS. BURGETT: Mr. Lewis is next.

CHAIRPERSON SEGALOFF: Okay. Mr. Lewis?

[30] MS. BURGETT: To be followed by Dr. Helms.

CHAIRPERSON SEGALOFF: Okay. Mr. Lewis, step right up please. Just please give us one second. I think it –

MS. TIRADO: We do have a binder here that has credentials for Mr. Lewis.

CHAIRPERSON SEGALOFF: He could tell us about himself, I guess. I don't see any reason why we shouldn't follow the same procedure.

MR. WEBBER: Procedure. Exactly.

CHAIRPERSON SEGALOFF: What – so why don't you tell us –

COURT REPORTER: Are you going to swear witnesses or not?

CHAIRPERSON SEGALOFF: I don't think we need to swear – I don't – Tom? No. I mean I don't think there's any need to swear witnesses.

MR. WEBBER: No.

CHAIRPERSON SEGALOFF: No.

Sir, why don't you tell us a little bit about yourself and how that relates to what we're trying to do here today?

MR. VINCENT LEWIS: Okay. First of all, my name is Vincent M. Lewis. I am a –

[31] A VOICE: Can you speak a little louder? We can't hear you.

A VOICE: Yeah. This one's not on.

A VOICE: Give him a mike.

MR. LEWIS: Can you hear me now?

CHAIRPERSON SEGALOFF: Yes, sir.

MR. LEWIS: I've been waiting to do that.

Okay. My name is Vincent M. Lewis. I am a former career firefighter from Michigan. I served 23 years on the department there and retired out as Arson Captain. I served in the Fire Prevention Bureau. I served in a number of other offices. I'm a twice-appointed public official as well. And currently, I am the Fire Program Specialist for the U.S. Department of Homeland Security. I'm an Arson Specialist. That is my background and that's what I do.

As relates to what I do – what I'm here for this evening, I just want to say I had a chance to look at both exams, extensively at the Lieutenant's exam and a little less extensively at the Captain's exam because of the time frame. So I'm prepared to answer some of your questions or most of your questions.

CHAIRPERSON SEGALOFF: And you've gotten some information about what has been going on in this [32] process and –

MR. LEWIS: Yes.

CHAIRPERSON SEGALOFF: – some of the issues we've been –

MR. LEWIS: I've seen some documentation –

CHAIRPERSON SEGALOFF: – exploring.

MR. LEWIS: – on what's been going on. And one of the things that was reported is that my name is Dr. Vincent Lewis and that's not true. My name is just Vincent Lewis.

CHAIRPERSON SEGALOFF: We have no doctors sitting right here. So that's –

MR. LEWIS: Okay. Just wanted to make that sure.

CHAIRPERSON SEGALOFF: That's fine.

MR. LEWIS: I have a Bachelor's Degree from Detroit College of Business. I have a Master's Degree from Central Michigan University and a concentration in human resources.

CHAIRPERSON SEGALOFF: Have you had an opportunity to deal with this whole testing process and testing issue over the years?

MR. LEWIS: Yes, I have. I've taken a number of promotional exams where I'm from, a city [33] similar in size and demographics to New Haven. And then I've been into another – other cities and looked at their exams as well.

CHAIRPERSON SEGALOFF: Okay. And you heard how we proceeded with Dr. Hornick. We're happy to get your impressions on what you've seen and what you've heard.

MR. LEWIS: All right. Let me just speak to the Lieutenant's exam first. I had a couple of questions. And they're not for the Commission to answer. Just something that you might want to ponder.

There are several references made to the fire department company officers manual. And –

CHAIRPERSON SEGALOFF: We're on a careful line here. I think that's okay.

MS. CAPLAN: Oh. Yeah.

CHAIRPERSON SEGALOFF: That's fine. But we just have to be careful we don't get into a specific question.

MR. LEWIS: Oh, no. That's not a specific question.

CHAIRPERSON SEGALOFF: I understand.

MR. LEWIS: Just the manual itself.

CHAIRPERSON SEGALOFF: Right.

[34] MR. LEWIS: And my only question would be were those materials available for everyone at the same time. And that's not for you to answer. That's just put out there.

In looking at some of the articles that I read, everyone didn't have access at the same time to the materials. That may be just something that you should consider.

A second question I looked at or pondered was the time it took or the availability for – or the eligibility of a person to take the Lieutenant's exam. And I understand they had to have 36 months on the department and then they became eligible.

And the reason I ask that question is because a lot of the questions or a number of the questions on the Lieutenant's exam dealt with issues that an apparatus driver needed to know. And if a person, an individual who had not had the training or had not had an opportunity to drive the apparatus, they may not be aware of those questions. That put them somewhat at a disadvantage. If they didn't have an opportunity to drive, if they were not a driver, if they did not receive the training, I think they were somewhat disadvantaged.

That would hold true as well, but not as [35] much, on the Captain's exam because they would obviously have to have been a Lieutenant first to be a Captain.

That would be my only questions on that.

I would say on the oral portion of the exam, because the boards were made up like they were, I would agree with the first speaker that they are probably not questionable because they had to come

to a consensus to get their final scores. And you did use a procedure which looks pretty much beyond reproach. So I would be comfortable with the way the oral portion of the testing was done. And you should feel comfortable as well with the way it was done. And that would true again for the Captain's exam as well.

Okay. With respect to the Captain's exam, I found it to be an exam similar to exams that I've taken before. I found that most – the candidates who were taking that exam should know that material. It should have been – as long as it was readily available, then it should have been – it should be a good test.

CHAIRPERSON SEGALOFF: Okay.

MR. LEWIS: Other questions?

CHAIRPERSON SEGALOFF: Do you want –

MS. CAPLAN: Yeah.

CHAIRPERSON SEGALOFF: Go ahead.

[36] MS. CAPLAN: Mr. Lewis, did you feel that most of the questions, if you had the book, the books to study – because on – I don't want to get into the actual questions. But if you had the study materials and most of the questions came from those books, do you feel that the Lieutenant's exam and the Captain's exam were fair in the questions they asked for both, for both the written and the oral?

MR. LEWIS: I felt the questions were relevant for both exams. And I would be comfortable taking them. I would even say that the way that the material was handed out, the way that I read the material where it listed certain chapters, that was – would have been most helpful. In the exam that I've taken, chapters were not listed. You were given a list of books and you had to know basically the entire – entire book.

CHAIRPERSON SEGALOFF: Do you have a – I don't know whether it's an opinion or a thought on why there was such a disparate impact, why we had so many proportionally, percentage-wise, minorities did significantly poorer than Caucasians? Is there – can you explain that to us in your – from your experiences or what you read or why that happened?

MR. LEWIS: I don't want to speculate. I [37] would say that I would agree, again, with your former speaker. That has been some of the pattern that usually whites outperform some of the minorities on testing. That has been a pattern in the tests that I've taken. But that would be for a number of reasons.

One of the reasons would be that there are more whites who take the exam. So, obviously, they would come out better, the more of them that take the exam. Again, without speculation, as long as all of the testing materials were available to everyone who had a chance to take the test at the same time, everyone should have done better than what they did on the exam.

I think what the Commission ultimately has to do is to make a decision on what's best for the framework for New Haven and best for the citizens of New Haven. That's a decision that would rest with the Commission.

CHAIRPERSON SEGALOFF: From your experience with other testing, the method, the methodology that was used here, if I'm saying it right – for instance, in designing this test – let me – in designing the test, as I understand it from what we heard before, the consultant went out and contacted Lieutenants and Captains who were sitting, gave them questionnaires, [38] got the questionnaires back, went and talked to two other outside – to two outside people. I don't know that there was – I don't know how – there was a fair amount of thought given apparently to designing the test. But I think that was the basic approach. Does that strike you as an appropriate approach? Is there something maybe you would have done or would have not done if you were – from your experience in taking tests – designing a test?

MR. LEWIS: No, it does not. That – again, looking at the exam, I thought there may have been maybe only one question that I could think of that you may have been a little unfamiliar with taking the exam. And it was relative to a direction on the exam. But it was not so far out that I thought someone taking that exam who was – who had the right testing materials, the background, the books and the literature, should have known that. I mean maybe –

and this is – this was not on the exam. But as an example, perhaps we talked about something being on South Street. Well, maybe there's not a South Street in New Haven as opposed to, you know, being East or West Street. But that shouldn't have hindered or been a cause of concern. I thought the methodology was fairly good. And I felt fairly comfortable looking at the exam, that I could pass [39] either/or exam.

MS. CAPLAN: Mr. Lewis, in the city that you are from in Michigan, has – in the past, have there been exams, fire exams, that have had a disparate impact? Maybe not exactly the same as ours. But have you seen that happen?

MR. LEWIS: Yes.

MS. CAPLAN: And how has your city handled that?

MR. LEWIS: Well, where I'm from they were bound by, as I believe you are, a union contract. At one time, they had two lists where they promoted one from each list. You had to promote a minority from this list, a Caucasian from this list. So if you promoted one, then the next promotion had to be a minority.

We also had, as you do, I believe, here, the rule of three where those persons who qualified as passing the exam were put in a pool and then the appointing officer could choose anyone in that pool and thereby bring in the issue of diversity. Once everyone had qualified, if every – if passing was 70 and you got 20

people in and above 70, then he could choose – or he or she could choose anyone in that pool and create diversity, if diversity was an issue for the [40] administration.

CHAIRPERSON SEGALOFF: Anybody have any other questions?

MR. WEBBER: No.

MS. TIRADO: I do. Dr. Hornick was his name?

CHAIRPERSON SEGALOFF: Yes.

MS. TIRADO: Dr. Hornick and you both indicated that historically minorities – whites outperform minorities on standardized tests. Can you offer a reason as to why that is? And if so, how then do we rectify that? Do we have to offer two tests? Or how do you reconcile that?

MR. LEWIS: No, I wouldn't recommend that you offer two tests. I would merely say – and like I say, it has happened to me on a number of occasions. But I can't speculate to say why it's happened. I can't tell you without just reaching out and just grabbing something. And I wouldn't want to do that.

MS. TIRADO: Okay.

MR. WEBBER: Could you –

MR. LEWIS: Yes?

MR. WEBBER: The test does contain a mixture of administrative questions and questions that [41] would be specifically towards firefighters only. Do you think the mix within this test was correct? Or was there any stress either way that you would particularly see?

MR. LEWIS: Again, I would say in the Lieutenant's exam I thought there was quite a heavy emphasis on issues that only drivers of an apparatus would be more familiar with.

MR. WEBBER: Yeah.

MR. LEWIS: And if you were a new firefighter, three-year, four-year, five-year – I don't know. If you hadn't had a chance to drive, if you hadn't been trained in driving the apparatus and using the equipment, there are going to be some issues there for you on that Lieutenant's exam. You're definitely going to have some difficulty.

In some of the material that I read, training was an issue. I don't know how training is done here. I don't know what's required. I don't know when is it required. And I don't know who gets training when. But I understand that training is not all on a level playing field as it should be. And those trained the best, those with the right materials, they will do the best.

CHAIRPERSON SEGALOFF: On that note, [42] anything else?

MS. TIRADO: No.

MR. WEBBER: That's it.

CHAIRPERSON SEGALOFF: Okay. Thank you, very much, Mr. Lewis, for coming up here from Maryland. Right?

MR. LEWIS: Correct.

CHAIRPERSON SEGALOFF: Right. We appreciate it.

MR. WEBBER: Thank you.

CHAIRPERSON SEGALOFF: Thank you.

MS. CAPLAN: Thank you.

MS. TIRADO: I'd like to make a motion that we take a –

Dr. Helms, would you like a – did you have an opp – do you want an opportunity to take a look at the test?

DR. JANET HELMS: No.

MS. TIRADO: No? Okay.

CHAIRPERSON SEGALOFF: Okay. You're all set? Do you want to take a break? Keep going?

MS. TIRADO: Keep going. Yeah. Keep going.

CHAIRPERSON SEGALOFF: Okay. We're all [43] set. Dr. Helms? Good evening.

DR. HELMS: Good evening.

CHAIRPERSON SEGALOFF: We'll do the same format, Dr. Helms. We've got a lot of your literature. But it's pretty hard to pore through it all. But maybe you could tell us a little bit about yourself and then we'll pick up from there.

DR. HELMS: All right. My name is Janet Helms. I'm a professor of counseling psychology and Director of the Institute for the Study and Promotion of Race and Culture at Boston College. My primary area of expertise is in race and culture, particularly race and culture as they influence performance on tests and other assessment procedures.

I have served on various testing organizations, test development organizations, including – I was joint-chair of the Joint Committee on Testing Practices, which is the national organization that develops standardized tests in this country. I've also been a member of the Committee on Psychology Testing for the American Psychological Association.

My experience is not with firefighters per se but is more in the general area of how race and culture influence test performance more generally.

[44] CHAIRPERSON SEGALOFF: Okay. We'll let you pick it up from there, if you'd like to just start and –

DR. HELMS: All right.

CHAIRPERSON SEGALOFF: – respond to some of the things we're interested in hearing.

DR. HELMS: I'm pleased to hear the Commission asking questions about why there is disparate impact because I think that's an issue that has not been adequately addressed at all by the established testing community.

We know for a fact that regardless of what kind of written test we give in this country that we can just about predict how many people will pass who are members of under-represented groups. And your data are not that inconsistent with what predictions would say were the case.

But we have very little information about why it is that people of color and sometimes women perform more poorly on these devices than do their white male counterparts.

What I want to do tonight is to see if we can shift the discussion somewhat from the characteristics of the test to the characteristics of the [45] test-takers and the intersection of the process of developing tests and the characteristics of the test-takers.

One of the problems we have when we talk about disparate impact is that we talk about racial group or ethnic group or gender group as though those terms have real meaning. But we know that race – racial group, gender group, ethnic group cannot actually cause behaviors. They cannot be responsible for test scores. And so, therefore, we need to be looking at what kinds of other factors might be accounting for why it is that minorities and sometimes white women perform more poorly on these kinds of tests.

As I looked at the materials that were sent to me, I developed several ideas about what might be possible factors that are related to your testing situation.

One has to do with how the written test was developed. The procedures that were used are standard practice if one is planning to use the test with a fairly homogeneous population. That is if we had used this test only with white male firefighters, we wouldn't be here this evening because there wouldn't be any obvious problem.

[46] However, in this case, because of the under-representation of African-American and Hispanic men and women and white women at the ranks that were used in developing the test, these groups were under-represented in the actual definition of the kinds of knowledge that were needed to be able to perform well in this test.

Based on the response rates, the greatest weight in defining the necessary job knowledge was provided by white participants. 67 percent of the people who participated in defining job knowledge were white men, followed by black participants, 18 percent, and Hispanics, only 15 percent. Women didn't have any influence on defining job knowledge. It's less than two percent of the participants were involved in this phase of development.

The reason why these numbers are important is because most of the literature on firefighters shows that the different groups perform the job differently. That is white men perform the job in ways that are

different from the ways that white women perform the job and ways that are different than the ways in which African-American and Hispanic men perform the job.

This is often because the kinds of experiences that are open to white male firefighters are [47] not open to members of these other under-represented groups. I do not know the extent to which this is true of the environments here in this location. But nationally, it's a fairly well-documented issue.

Nevertheless, the point here is that in defining the job-relevant knowledge one needs to make sure that one has sampled sufficient numbers of each of the under-represented groups to make sure that their ways of performing the job have been incorporated in the evaluation process.

One also needs to assess the extent to which their white counterparts are aware of such issues and incorporate this awareness in their job knowledge and understanding of the job.

If the content of the test only – or overly pertains to the job as white men perform it, then the test is likely to be unfair to the under-represented groups because it underestimates their job knowledge and potentially overestimates the job knowledge of their white male counterparts.

There were a number of racial and gender issues that occurred to me as I looked at the data that I had available to me. In addition to the possible problems

of the test specifications – the job [48] specifications of the test, there were also questions about the testing conditions. In the newspaper accounts, many of the people who seem to be dissatisfied with the test talked a lot about the fact that different kinds of experiences were available to different test-takers.

They talked particularly about the fact there were more opportunities for training and performance in the actual roles that were tested if you were a white male than if you were members of the other groups.

Because men of color and women are often excluded from informal associations with their white male co-workers, they are often excluded from the informal mentoring that happens in these groups. There is evidence to suggest that having guidance as to how to behave in interviews, as well as other kinds of coaching, may improve test performance.

It is also important to determine whether, in fact, it was the case that different kinds of preparation were available for people depending on their racial and/or gender membership groups, as the complainants in the newspaper accounts asserted.

Finally, the situation that never receives any attention and I'm told did not receive any attention [49] in this circumstance has to do with the test-takers characteristics. No test can be a perfect measure for all kinds of people. And so it is important to collect background information so one can ascertain the extent to which that influences test scores.

I had no background information other than the racial and gender groups of the people who took the test. And I understand that that's the kind – only kind of information that's collected.

But let me suggest some other kinds of information that you might want to collect post-talk or, if not post-talk, at least in the future. One has to do with language diversity. Individuals who speak a language as their first language that is not English or a dialect that is not English often perform lower on tests that are primarily English language tests. This is because – a number of reasons. Sometimes they do because they language-switch during periods of stress. And so they're unable to function as efficiently during the test as their monolingual counterparts. Sometimes it occurs because they have insufficient time to complete the examination. But there are a variety of reasons why having more than one language might adversely affect one's test scores.

[50] If one looks at the performance of the Hispanic test-takers, for instance, on average, they would have – they would have passed the written exam. But the oral exam appears to be the place where the most adverse impact occurred. And so one has to ask what kinds of factors were operating that influenced their test scores in that way?

We also know that evaluators may react more negatively to people who speak accented speech. And so we need to assess the extent to which that might have been the case.

There is no information about the languages, the primary languages, of the African-American or, for that matter, for the white American people who took the test. We need that kind of information because that should be factored in to how we interpret the test scores.

Test scores may be lower if the test-takers are functioning under expectations that they will not perform well on the test. We talk about that in psychology as stereotype threat, fear that they will confirm negative stereotypes about their group by not performing well. This places the person under undue stress and, rather than focusing on the test per se, they [51] expend a lot of energy in trying to do the best that they can rather than simply answering the questions.

Test-takers' scores might be lower if they are acculturated to a non-dominant cultural group as, for instance, African-Americans or Latinos often are, a group in which the customs and traditions differ from the larger group on which the test was developed. In that case, to the extent that the test reflects the dominant culture, then these test-takers may be placed at a disadvantage. We need to know more about the background and acculturation experiences of our test-takers.

Test-takers' scores might be lower if their socioeconomic status is lower than the socioeconomic status of the group on which the test was developed. This is because they are less likely to have the same

kinds of exposure to experiences the test might cover. We need to know more about that kind of experience.

Test-takers are likely to score lower if the test focuses on traditional ways of doing the job and the test-taker, in fact, uses innovative approaches. We know that it's often the case that minorities and white women must use innovative approaches to do the job because they don't receive the kind of mentoring that [52] allows them to perform in the traditional kinds of ways. So for – being survivors, they might, in fact, being penalized for their skill and ingenuity.

These are a couple of reasons or some reasons why I think we need to begin to think about not only the characteristics of the test but the characteristics of the people as they interact with the test and with the testing process.

CHAIRPERSON SEGALOFF: Thank you very much, Dr. Helms.

Questions?

I'll just ask one as a starter. You mentioned that firefighters perform the job differently. I don't know if I'm stating that accurately. But maybe you could expand on that. It strikes me that there's some performance being a firefighter that it just doesn't – isn't affected by your – by culture or race. I mean is that fair to say? That you're on that truck and you're heading down to that fire and there's someone screaming on the third floor and – and maybe I'm making it too simplistic. But culture or race doesn't

strike me that on that kind of a situation – these guys are all rushing in there to save lives. We've had some testimony about that. Is that –

[53] DR. HELMS: Well –

CHAIRPERSON SEGALOFF: – fair in some respects?

DR. HELMS: – recognize that what we are talking about is not the culture or race per se but how people are treated because of the race or culture per se. And so often what will happen is that women and men of color have to earn their way into the brotherhood of white firefighters. While they're earning their way into that brotherhood, that often means that they're doing things by themselves that their white male peers are doing collaboratively.

So we have to begin to think about how – not just that you are a woman or a person of color, but how people react to that influences how you perform your job.

CHAIRPERSON SEGALOFF: Okay.

Mal?

MR. WEBBER: There was a number of efforts on the – during the planning and administration of this test which were taken to try to eliminate racial, sex discrimination problems within the test. I am just questioning whether it would be possible to completely eliminate them. Because the minute you

move in one [54] direction, according to your testimony, you might be affecting the other level.

DR. HELMS: I – well, in a sense, you've asked me two different questions. One of the things that as I read the materials was done to make the testing a fairer process was to examine the items for stereotypes. But the fact is that stereotypes may be group-specific. And so if you do not include a broad range of people in that examination process, then stereotypes may still be there that people are unaware of. So that's one aspect of your question.

The other aspect has to do with whether there will always be racial and/or gender differences regardless of what you do. I don't know the answer to that. But my thinking is that if we were to develop ways to measure the characteristics that result from race and gender rather than just using racial category, then we could, in fact, correct scores for that kind of factor.

MR. WEBBER: Thank you. I think we're both saying the same thing; that every effort must be made to eliminate this.

DR. HELMS: I –

MR. WEBBER: But whether we will be 100-percent successful none of us can ever predict.

[55] DR. HELMS: I think that's entirely true.

MS. CAPLAN: Dr. Helms – and I'm trying to look at both sides of this whole thing that you're talking about. And as you know, the test itself, there were study materials supposed to be available. And let's say that everybody had the same study materials and that the test itself, the questions came from those books and the answers were within those study materials.

And I know that you didn't – you didn't want to look at the test itself. But are you saying – is that – are you saying that no matter what test, even other tests that the City gives, that within every test that is given there is an – is there – there is a –

CHAIRPERSON SEGALOFF: Element?

MS. CAPLAN: Element of – yeah. Element of problems with race and culture and gender within those tests. Is that what you're saying?

DR. HELMS: That's what I'm saying. Since 1896, we've always found a disparity between blacks and whites, Hispanics and whites on that kind of – on that kind of written test particularly. The disparity has been about the same. It deviates by a couple of points. But we can almost tell you what your disparity will be even before the test is taken.

[56] And so the issue is – for me at least becomes not just describing that disparity but beginning to think about what causes it. And if we can't figure out what causes it, then we need to develop a new way of assessing people.

MS. CAPLAN: Thank you.

CHAIRPERSON SEGALOFF: Could you share with us maybe some of the – I heard you talk about it to some extent. Some of the – if we concluded that this was – we shouldn't certify this exam and that there's a better mousetrap, there's a better way to do it, tell us, if you could, what would be the better way to get an exam that would be likely to result in less of an adverse impact, other than – I mean we had an approach or some comments by Mr. Lewis that talked about how they've done it in other communities in terms of selection processes from maybe – based on race.

But if we just took this, tried to make a new exam and make it better, could be do it? And how could we do it?

DR. HELMS: I think that it is, again, not so much the characteristics of the exam because essentially even the exams that the first speaker talked about had disparate impact. I think we have to begin to [57] conceptualize the process of using tests differently. So that right now what we do is we assume a test score means the same regardless of the characteristics of the people who would have taken it.

What we need to begin to do, however, is to pay more attention to the experiences of the people who are taking the test and develop means of measuring those experiences that allow us to adjust test scores to take those things into account.

To give you a more practical example, we know, for instance, that we can reduce disparate impact by knowing something about the socioeconomic status of people and taking the socioeconomic status – removing that from their scores, that reduces the disparate impact to some extent.

If we were to broaden that to include things like language, remove that from people's test scores, and other things as we discovered those to be factors that were related to that impact, then we would have a better testing process, in my opinion.

CHAIRPERSON SEGALOFF: Thank you.

MR. WEBBER: Thank you.

CHAIRPERSON SEGALOFF: I think we're all set. Thank you very much.

VERBATIM PROCEEDINGS

CITY OF NEW HAVEN
CIVIL SERVICE COMMISSION

IN RE:
FIRE CAPTAIN AND LIEUTENANT
PROMOTIONAL EXAMS

MARCH 18, 2004

KENNEDY MITCHELL HALL OF RECORDS
200 ORANGE STREET
NEW HAVEN, CONNECTICUT

* * *

[5] MR. UDE: Thank you, Mr. Chairman, [6] Commissioners. I want to start by thanking you for this opportunity to make a presentation to you, summarizing again, as I attempted to do at the outset, the relevant law and how it applies to these – the results of these examinations.

I asked for, and you gave me, this second opportunity. I asked for it because at the time that I outlined the law to you initially, we had not heard from – you had not heard from the testing consultant. None of us had heard from the three consultants from whom we heard last week. And I thought, in light of a number of things that were said during those, that

there were some points that I thought it was important to stress.

I want to start with saying that in my view both Title 7 and our Civil Service system – Title 7 being the most directly applicable federal civil rights law – have common goals. One is do not discriminate against or favor anyone based on race, ethnicity or gender. Second, make sure that equal opportunity is afforded to everyone, regardless of those same traits, so that no one is given an advantage or disadvantage when compared with someone else on the basis of those grounds.

Congress, when it passed Title 7 in 1964, said [7] Nothing in Title 7 permits a person to demand employment. The Act's primary task is to make certain that the channels of employment are open to persons regardless of their race and that jobs are strictly filled on the basis of qualification. The rights of citizenship mean little if an individual is unable to gain the economic wherewithal to enjoy or properly utilize them."

Now, Congress outlawed two types of discrimination. The first one is the one that is the most easily recognized. And that's intentional discrimination. That is discrimination where someone clearly states that people are going to be treated differently, either because of their race, their ethnicity or their gender.

The second area is discriminatory effect laws. That means a facially neutral process that nevertheless has the effect of discriminating against one group or one segment of the population.

Now, I want to point out that the definition of a law that has discriminatory effect starts with facially neutral. In other words, it is – the suggestion in some of the discussion over whether these exams were facially neutral I think is really not the point. If they were not facially neutral, we'd be [8] talking about a matter of whether they showed a discriminatory intent. It is the fact that they are facially neutral that makes adverse impact, job-relatedness and the existence or absence of other procedures that accomplish the same goals, the three issues that need to be looked at.

Adverse impact has been defined a number of different ways. And while there are – whether you look at it in four-fifths or eighty percent or statistical deviations, the key is the same. If the result is significantly different from an expected result – and the law defines an expected result as one that occurs by chance. In other words, if you've got a population that's 50/50 and you end up with something much different than that, then you have adverse impact. That's the beginning, though, not the end of the discussion.

When you have adverse impact, the federal guidelines and federal case law makes clear you cannot use a procedure that has an adverse impact

unless it is justified. And by justified, they mean that it's job-related, consistent with business necessity. And there's a second piece of that which was enacted into law in 1991 based on some earlier case law which says that if there [9] is another – if an employer is using a procedure, like a test, to select people for a particular position and there is – and it has adverse impact and there is another procedure that is just as good for testing for that position but has less adverse impact, the employer is required to use the test that has less adverse impact.

Now, I think that's an important point for a couple of reasons. First – well, let me take them one at a time. First, the job-related issue. That's what was referred to as a validation study as the most common way to review that, which is something that the unit recommended. The consultant from I/O Solutions discussed that. The question is not whether the questions are facially neutral because, as I said, everybody would assume that they were. If they were not, the evaluation process would be much simpler than it is.

The question on whether an examination is valid is is it really testing for what you're looking to test for? And I want to point out that there is a case that came down in New Jersey involving fire promotional exams where the State of New Jersey, which was responsible for coming up with the exams in that case, had administered promotional exams for either Captain or Lieutenant to various towns in New Jersey. And the Judge [10] in that case threw out the

results of those tests after promotions had been made because of some flaws that the Judge found in the test. And a couple of them I think bear pointing out.

Some of the tests tested for knowledge of terminology, such as "nozzle reaction" or "unity of command" instead of the concepts underlying that terminology, number one. Number two, a number of the questions on that test referred in the question itself to a particular source as opposed to a different particular source.

The Judge found that – in other words, it said that – sorry. The test asked, for example, "According to Firefighters Principles and Practices, blank is the quality that firefighters most want in an officer." Rendering the test, in this Judge's view, more probative of the test-taker's ability to recall what was in a particular text than their firefighting or supervisory abilities.

And I want to remind you, as I know you're already aware – but I think it bears repeating. These tests were designed to determine who is going to supervise people within a fire department. Whether the principles they're relying – there are certain facts, [11] like melting points or, you know, physical measurement, that is important, obviously, for firefighters and their supervisors to know because they need to know that and they need to know it cold in order to make the judgment calls they have to make.

But I think that when we're asking – when we're trying to determine and we're trying to measure

someone's ability to be a leader on a fire scene, it's not a – it is not as important, I would submit to you, whether they can remember that a particular book says that a particular practice is the best one. What we expect them to do is read whatever sources they are and come up with and make the call that they believe is the best call. And that's the call that we should looking and expecting from them. In other words, to review different materials. And we should be looking for, if there is a best answer, then that's fine for a multiple-choice test. But the goal of the test is to decide who is going to be a good supervisor ultimately, not who is going to be a good test-taker.

The Judge in that case also questioned whether a multiple-choice test, which is only one form of a written examination, is the best way to actually evaluate the abilities of a supervisor. I'm not saying [12] it necessarily is the worst way. But no one faced with a scene that our Lieutenants and Captains will be called upon to supervise, assess and manage is going to be presented with a multiple-choice option.

Civil rights law requires that an employer prove that the test being given is suited to selecting the best people for the job. It also requires that you consider whether the test that you're using doesn't unnecessarily disadvantage or advantage a particular group of people who are taking the test either from being selected or not being selected for the job.

When you're talking about something like accounting where the principles are clear and there's

pretty much only one way to do it, a multiple-choice exam or some other type of exam like that may be much simpler. But this isn't accounting.

It is not, as a rule, fair to change the rules of a game after the game has been played. But we're not talking about a game here. We're talking about a promotional exam that will affect the lives and safety not only of the people being promoted but the people who they will be supervising and commanding and the citizens and the public of this city.

As I said before, a finding of adverse [13] impact is the beginning, not the end, of a review of testing procedures. Where a procedure demonstrates adverse impact, you look at how closely it is related to the job that you're looking to fill and you also look at whether there are other ways to test for those qualities, those traits, those positions that are equally valid with less adverse impact.

When Dr. Hornick, the consultant that the Commission selected after his name was submitted by Local 825, the union, testified, he started to identify that there – first, that there are written examinations that have less adverse impact. I think that he said, in fact, the written exam on this had one of the most severe adverse impacts that he had seen.

He also said that there are other methods of testing, particularly for supervisory positions, that are not just equally valid but more valid and have less adverse impact. He, I think, also added that he has never had someone say that the person who

received the highest score on a written examination was the best – necess – was the best person for the job. He said that there are much better alternatives to identifying those skills. That was something that, because of time and because – and for any number of reasons, but I think [14] primarily because of time, that was not a discussion that was pursued. Nor I think at this point would it need to be because I – because currently and since 1986, there has been an agreement in place with the Local 825, the union that affects all of the personnel in the fire department with the exception of the Chief and the Assistant Chief. There's been an agreement in place for these positions which says that written exams are going to be 60 percent of the total-weight, oral exams 40 percent.

As I said at the outset, Title 7 doesn't allow us to say that that is necessarily going to be set in stone if there are other, more valid ways. However, I am not saying at this point that it is time to shift from that. I think that that is something that needs to be explored in partnership with the union and with testing consultants so that we can be sure that we are testing in ways that not only minimize adverse impact against any group but also are the best ways to test for supervisors within the fire department and possibly with other departments.

The goal of both Civil – federal law does not allow us to take a pass on this exam and wait until the next time to find a less discriminatory way. If the [15] results and our procedures under this exam would

have a discriminatory effect that could be avoided, the law says that we do not go forward with that process.

It is my responsibility to advise whether or not examinations and our Civil Service Rules will result in discriminatory promotions. It is the responsibility of Human Resources and the administration and your board to ensure that they do not.

The goal of both Civil Service laws and civil rights laws is, again, to find the best person for the job, regardless of race, ethnicity or sex, and to use procedures that are fair to everyone and truly give equal opportunity to those taking them, not just lip service to it. It is not simply a matter of just giving any old test and then whoever does best on that test is going to get the promotion.

These tests – these tests do not appear to have served that purpose as best they could. The purpose of the test, again, is to find good supervisors, not good test-takers.

You have a choice. It is my opinion that promotions under our rules as a result of these tests would not be consistent with federal law, would not be consistent with the purposes of our Civil Service Rules [16] or our Charter nor is it in the best interests of the firefighters and Lieutenants who took the exams, those who will be serving under them, those who will be served by them in the public.

My recommendation is not to certify the results of these examinations. I believe in light of the fact that we have been promised litigation regardless of whether the list is certified or whether it's not certified, not certifying is – allows the department to move forward on solid ground rather than on thin ice and it allows and ensures that there will not be promotions made that would – that could later be disallowed, as has happened in the past and as everyone, including one of the members of the department can testify, and the union president, everyone has an interest in ensuring that that does not happen.

I just want to conclude with a couple of comments from the same Judge I was referring to earlier about the court's – that court's concern, which I share, for the time and expense devoted to this matter. There were in that case, as in this one, "Qualified experts who were engaged who were engaged in this review process who can devote their time and energies to developing tests for the future rather than continuing to critique those [17] in the past. If litigation ensues, there will be much more expense and much more time devoted to fighting over the validity of these tests which I believe both on adverse impact and on their own merits are questionable. Then there will be a moving forward on finding a better way to test for these positions. Absent cooperation among all the parties, any new test may well be the subject of further litigation." And as a result, in that case the Judge pointed out that "Cities in need of permanent leadership in their fire departments, applicants who

have stood by patiently awaiting promotion and minority firefighters who have been wrongfully denied opportunity, all will continue to flounder in a sea of uncertainty. The need for judicial intervention in those matters ill serves the public and the private rights that are involved. It leads to the courts being blamed for adverse consequences which would befall successful candidates who will be denied promotion at this time because of this decision, but such criticism is akin to blaming the firefighter for causing a fire simply because he is called upon to extinguish it. What is often described as judicial activism in disallowing an examination is more accurately characterized as executive inaction."

[18] In this case, it is not a matter of executive inaction. It is a matter of executive action that has presented – that has brought the results of these examinations and the issues that they raise before this board because the issues that it raises, equal opportunity for all and ensuring that the best qualified people, regardless of race or gender, are selected, those issues are too important to ignore. They're too important to just rubber stamp and leave it to a judge or the Equal Opportunity Commission or the Connecticut Civil Rights – the Connecticut Commission on Human Rights and Opportunities to decide.

We have a responsibility. We took an oath to serve all of those laws, federal, state and our city's. And those laws are best served by not certifying the results of these examinations.

CHAIRPERSON SEGALOFF: If I might, I'd like to ask Tom a few questions. Does anybody have a problem with that?

MR. WEBBER: I've got a couple. After you.

CHAIRPERSON SEGALOFF: Is there a problem with me asking the questions?

MR. WEBBER: No.

[19] CHAIRPERSON SEGALOFF: Tom, I've got a couple of questions for you. One is there's a case that came down in December about Allen Hicksdale and Woodlot versus the City of Chicago, December of last year. As I read that case, there was a problem with an exam. The results were a disparate impact. For a variety of reasons, and I'm being a little simplistic, but the case was sent back and the instructions were essentially to provide a new exam. There was a new exam given. And the exam result essentially are the same results.

So I guess one thing I would ask you is what makes you think, based on what we've heard here sitting as a Commission, that if we don't certify and a new test is designed or another test is designed, that those results are going to be any different?

MR. UDE: There are no guarantees. And I'm not in a position to make a guarantee. And I understand – and what I would say is this. Twofold. The results of previous exams in this department and in other departments have not had this kind of a result, which is one of the reasons why these results

were so startling when they came down. These results were different. The outcome and the impact of these results is different from what we've seen on previous examinations.

[20] The distribution is different. And adverse impact analysis – and I didn't get into a lot of detail about it because I didn't want to get into the statistical side. But it doesn't just look at the pass/fail rates. It also looks at the distribution. If you have minorities passing at a decent rate but they're all bunched at the bottom of the list, that's still adverse impact because you look at the real selection rate. So that's one piece.

The second piece. In each of the exams that we've given, although it's true that there were larger numbers on some of these – on some of those prior lists, there were people from all ethnicities and races fairly high up and distributed pretty fairly across those lists.

Third, those lists were not challenged as having adverse impact, whereas we are assured that these will be.

The second thing is that the law doesn't say that you can't use a test or a process that has adverse impact. It does say that you have to be prepared to justify that. My take on that –

CHAIRPERSON SEGALOFF: We had – my understanding is the group, if you will, that is making [21] to throw the exam out has the burden of

showing that there is out there an exam that is reasonably probable or likely to have less of an adverse impact. It's not our burden to show that there's an exam out there that can be better. We've got an exam. We've got a result. If somebody – and I understand. If somebody can show us – and we're just a commission. I mean I'm not –

MR. UDE: Mr. Chair, I point out that Dr. Hornick said that. He said that there are other tests out there that would have less adverse impact and that wold be more valid.

CHAIRPERSON SEGALOFF: You think that's enough for us to throw this test upside-down –

MR. UDE: Well, there's –

CHAIRPERSON SEGALOFF: – because Dr. Hornick said it?

MR. UDE: I think that that by itself would be sufficient. Yes. I also would point out that when I – that it is the employer's burden – if this were to go to court, it is the employer's burden to justify the use of the examination, which is separate from whether there is another procedure that is as valid and has less adverse impact. They're two separate issues.

[22] And I am not as I sit here, having read the test, I am not confident that that is a test we would be able to –

CHAIRPERSON SEGALOFF: Did you read the test?

MR. UDE: I did read the test. And I – one of the reasons why I wanted to bring that case from New Jersey throwing out promotional examinations in a similar – in the same field but in a different state is because I noted some similarities between this test and that test. There were a number of questions on this test which referred back to particular sources. I'm not saying that the reference back was inaccurate. But if the goal of the test is to determine who is the best supervisor as opposed to who remembers what was in a particular book as opposed to a particular other book, which I hope is the goal of the test, then I don't know whether this test is particularly well-suited to that or not.

CHAIRPERSON SEGALOFF: Isn't that a tough burden for us as lay people? We've all read the exam. To try to develop an opinion as to whether or not those questions researched, that they do not properly test for the position of Lieutenant or Captain? I mean if you [23] look at that exam – and we're not – I don't think any of us are psychologists or – I mean – we're just regular people looking at an exam that on its face I guess I would say didn't strike me as not properly testing for that – for that position. And we had Mr. Lewis – was that his name? Mr. Lewis who is a fireman, who is with Homeland Security, sit here and tell us he looked at the exam and he thought that exam fairly tested for these positions.

MR. UDE: Well, I would submit Mr. Lewis was the only one of the three people that spoke before you who was not a professional psychologist.

CHAIRPERSON SEGALOFF: And the only one –

MR. UDE: And the only one that's a firefighter. Dr. Hornick has – is a professional testing consultant who has prepared similar examinations throughout the country. And he said unequivocally that there are better ways to test for these positions that are more valid and have less adverse impact.

And I understand, Mr. Chairman, that this board is made up of lay people who are not professionals in these areas. I would submit that I, as the Corporation Counsel, and the Director of Human Resources and the Chief Administrative Officer, who you will hear [24] from shortly, are professionals who are charged with making this our job, full-time job, to advise you on what the law is, on what the state of testing is and to try to bring before you the people that will be able to assist you in that analysis.

CHAIRPERSON SEGALOFF: I just have one last statement. And I don't mean it sarcastically. And I have a lot of respect, a lot of respect, for Tina and Noelia. They're – in the years I've been on this board, I think they are real professionals. That being said, they work, to some extent, with the – they do the hiring for the group that put the exam together. And I just – at some level, that sort of jumps out at me. We've got a couple of very fine people here. They went through an RFP. They set some ground rules. And now the view is that the test that was put together by the people they selected – that some of the,

I guess, parameters that they insisted upon just didn't make it.

MR. UDE: There are a couple of things, Mr. Chairman. One of the criteria that was included had to do with written tests that would be 60 percent, oral would be 40 percent. That was not something that had been questioned or challenged significantly, to my knowledge, prior to the results of these examinations.

[25] I think one of the things that – and I think while it might have been desirable – no. It would have been desirable had it been done beforehand than after. One of the realities of life is that until it is apparent that something is not working or something is wrong, you don't do that kind of examination. Nobody goes to the doctor if they're not feeling sick.

And the selection process for this was, to my understanding – and Ms. Burgett will be able to talk about this in a little more detail – was similar to the process that we have used on a number of other exams successfully. However, the fact that the process by which the consultant was selected was satisfactory and complied with doesn't mean that the consultant did a good job.

And I'm not necessarily saying they did a bad job. I'm saying that we, as a city, as an employer, who, if the exam results are certified, would be faced with going to court to defend the process. The same people that selected I/O Solutions, the same people that oversaw this process, would be the ones charged with

defending it, do not believe that that is the appropriate course of action.

And we don't – I can assure you for [26] myself – and I'll let Tina Burgett and Karen Walton speak for themselves. But it is not by any stretch something that I do lightly. It is clear from the testimony of everyone who took the test, notwithstanding remarks made by some representatives of some firefighters – my understanding from everyone that spoke publicly or privately to people is that they studied hard, they spent money on the books and they tried hard. The question is not whether they failed. The question is whether the exam failed them.

CHAIRPERSON SEGALOFF: Thank you very much.

Go ahead, Mal.

MR. WEBBER: If my memory serves me correctly, over the past – if my memory serves me correctly, over the past ten years we've had some two tests for Captains and Lieutenants, two Civil Service tests, neither of which were challenged, both designed by the same people, I believe.

MR. UDE: No. I believe they were designed by other consultants. I believe the other tests were designed by other – by different consultants.

MR. WEBBER: Can you tell me – or perhaps Tina can. But is there any significant difference in [27] this test compared to the two which were –

which have been accepted so readily by the community over the recent past?

MR. UDE: Other than the adverse impact that is clear from this test, I cannot because I have not – I've reviewed these, the two tests at issue here. I have not reviewed the previous tests. So I can't speak to those.

I – what I can say is that there was no challenge to their validity nor, to my knowledge –

MR. WEBBER: Any adverse –

MR. UDE: – did anyone – there was – the – there may have been some degree of adverse impact but it was much – much less than what was shown here. And, again, as I – again, adverse impact starts – not that there isn't a review, anyway, because I believe – because there is. But adverse impact triggers – significant adverse impact, in particular, triggers a much closer review, a much closer examination, because it's like setting off a warning bell that there may be something wrong. May be. Not necessarily that there is, but that there may be something wrong. And that's what triggers the closer scrutiny of job-relatedness and also is there another way that's just as valid that has less – [28] that would have less of an adverse impact? And if there is, if the answer to the first one is no or if the answer to the second one is yes, then the path is clear. The choice is clear.

CHAIRPERSON SEGALOFF: Anybody else?

One last question. I want to be clear on this. One of the threads that goes through this every meeting is someone, either explicitly or implied, tells us that they're going to bring a lawsuit, that there's going to be some litigation. I just want to be clear from your presentation, Tom, are you suggesting in any fashion that the possibility of litigation or probability of litigation or likelihood of litigation should factor into our decision-making?

MR. UDE: I think that it is an area of concern for the City as a whole as to whether – certainly any litigation is a matter of concern. But should it influence your decision? If you believe –

CHAIRPERSON SEGALOFF: And if so, how and why?

MR. UDE: If you believe that you're making the right decision, then that is the decision that you should make, even if it is going to lead to litigation. My point about litigation ensuing is that

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[34] MS. BURGETT: First of all, let me say thank you. And before I begin, I do want you to know that I also have taken the time to read the exams and go through the questions in detail and have some discussion with the chief examiner when I had a question about a question.

In November and December of 2003, the City administered promotional exams prepared by I/O

Solutions. For every applicant, these tests were the culmination of months of work. We had all heard that when this board met in the new year it would certify test results, paving the way for promotions to the positions of Lieutenant and Captain of the department's most qualified.

These have been grueling weeks since January for each of you, for members of the administration, the Chief of the Fire Department and his Assistant Chief and, of course, most importantly, for every firefighter in this room and in every house across the city.

When the Board met initially in January, it was provided a report from the chief examiner [35] regarding this and previous promotional examinations. This report has led to an unprecedented review of the exam and its results. The Board itself has held two public hearings and three meetings since January. You have heard from three different and distinct individual experts, consultant to uniform service testing and a leading assessment psychologist, as well as having read the exam yourselves.

Chad Legel of I/O Solutions spent time detailing the exam process, its development and its implementation. You have heard from firefighters their personal stories of the sacrifice every family made, the financial resources everyone expended and the amounts of time everyone spent studying.

Yet, the end result on these two exams is always the same. We are still left with significant adverse

impact that cannot be accounted for. A unique demographic distribution in scores that is, indeed, different from previous promotional exams.

These exams will impact not just current Lieutenant and Captain vacancies but future promotional opportunities as well. Fewer African-American and Latino Lieutenants will affect the diversity of those sitting for the next Captain's promotional exam. Still yet fewer [36] African-American and Latino Captains will affect the diversity and be able to sit for those sitting for future Battalion Chief exams and Deputy Chief exams.

And as Chad Legel told City administrators, he did not understand why there was such adverse impact. It was, he suggested, perhaps simply an anomaly. Neither could Chris Hornick. Dr. Hornick stated that some of the adverse impact was fairly typical, yet some was not and that the test showed significant adverse impact.

The president of Local 825, Pat Egan, is correct when he reminds us that there has been adverse impact in other examinations. The results of previous exams were not as stark nor were they challenged.

During Dr. Janet Helms' testimony, she stated there is very little national data as to why minorities perform less well on standardized tests but nonetheless national data continues to show adverse impact for people of color. Standardized cognitive exams measure knowledge but they do not measure ability or skill.

According to the Charter of the City of New Haven, the Personnel Director or myself is to prepare, conduct and score examinations of qualified [37] applicants for all positions in the classified service and to certify those results thereof to the Civil Service Commission. I cannot do so.

There is less evidence that all the applicants operated from the same level playing field of skill, competency, training, education and mentoring. Upon close reading of the exams, the questions themselves would appear to test a candidate's ability to memorize textbooks but not necessarily to identify solutions to real problems on the fire ground.

Dr. Hornick started to point out that alternative testing does exist, including alternative written exams, that have less disparate impact.

The initial data first identified led us to closer scrutiny of the exam and the exam process. That scrutiny triggered questioning of whether other testing procedures exist that are equally valid but with less disparate impact.

Finally, upon closer review of these two exams, their content has raised, rather than answered, questions about how valid these tests are for the purposes intended.

We believe that equally valid, less discriminatory alternatives to this test exist. And it [38] would be irresponsible of me not to urge you to pursue such

alternatives. And that is the heart of the question before us.

Merit-based testing must ensure not only a fair job-related test for all applicants without resulting in disparate impact but, also, that the most qualified candidates are selected. We do not have such results in these two exams. I urge you not to certify.

CHAIRPERSON SEGALOFF: Tina, I have a question about the exam per se. One thing I'm hearing to some extent from me, I think, and Tom – clearly, one thing we're hearing is that as important tests for leadership skills, these are leadership positions. You've got men and women under you that you're leading, if you will. And that's important.

But it seems to me that the other part of the exam, which is the multiple choice, is sort of being dismissed as "Well, that's just memorization". As I looked at the exam, it very clearly said, "Okay. From the following handbook, here's the following 15 questions." It didn't necessarily strike me that it was solely memorization. But there were some questions that it appeared to me as questions were being asked that, in fact, it was important to know those answers from a [39] technical standpoint, leadership being important. But am I – tell me about that.

MS. BURGETT: I don't disagree with that. There are a number of tactical questions. And, first of all, I am ill-equipped to –

CHAIRPERSON SEGALOFF: You didn't see the exam?

MS. BURGETT: I did. I've seen the exam. I'm talking about the tactical questions. There were non-tactical questions in the written examination. It is a very standard cognitive examination, written examination. Multiple-choice tests often are. And I know we cannot discuss the questions in open session. But what I would at least observe, there were a number of questions where I thought the difference between an "A" or a "D" or a "B" or a "C" or what have you was so minute that unless you had literally memorized that sentence, you could not necessarily have answered that question in particular.

Again, I want to emphasize I am not speaking of tactical questions. I'm not prepared to say that – I agree it is important for someone to know the temperature of such-and-such or how long something needs to be. I'm not disputing that.

[40] But there were other questions in that exam that were not tactical in nature. And those are the ones that I was particularly concerned about as I read through yesterday.

I think Dr. Hornick has begun to suggest that there are some different ways of doing written examinations. It is not so much that one throws out everything one knows about testing, but that there are more best practices around testing that need to be looked at, including more behavioral-based written examinations.

CHAIRPERSON SEGALOFF: I just have to ask this because Hornick is suddenly becoming that guru that the union has selected –

MS. BURGETT: Right.

CHAIRPERSON SEGALOFF: Obviously, I don't know why. But it's interesting phenomenon that the union selected him and the City keeps quoting him as a person that we should rely upon more than anybody else that this test is a better way – a better mousetrap.

Did Hornick do any – I don't have it in front of me. But did Hornick do any testing for the City of New Haven prior to this?

MS. BURGETT: No. No. The name of his company, CWH Consultants, has not responded to a bid that [41] we put out in the past. So he has not done any testing –

CHAIRPERSON SEGALOFF: Not responded to any of the –

MS. BURGETT: No. No.

CHAIRPERSON SEGALOFF: Okay.

MS. BURGETT: That doesn't mean we were sending them to the correct –

CHAIRPERSON SEGALOFF: Oh, no, no. I understand. I just – I want to look at my notes to see more about Hornick –

MS. BURGETT: I don't want you to misunderstand that I do not think that Dr. Helms or Mr. Lewis were equally as important.

CHAIRPERSON SEGALOFF: No. I understand. I mean I hear you.

I don't have anything further.

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[62] CHAIRPERSON SEGALOFF: If everyone is ready, I think the way we'll approach this – first of all, I would suggest that what we're going to do is someone make a motion to either accept or reject this exam and we'll have a second, if there is a second, and then we'll have discussion.

But maybe prior to that, if anyone feels they want to make a statement of any sort, certainly they're willing to be heard.

MS. CAPLAN: I just want to make a statement that this is my own statement. It is not a reflection of the Commission. So it's a personal statement.

I'm going to read you this statement right now. If this particular case regarding the eligibility of the promotional exams for Lieutenant and Captain in the fire department that has been before us for the last three months does not cry out for Civil Service reform, then nothing else does.

In the few years that I have served as a [63] Commissioner on the Civil Service Commission of New Haven, some things have become remarkably

clear to me. There are smart people in the City administration, your Corporation Counsel's Office and the Human Resources Department and in the Fire Department. My colleagues, who are all appointed, unpaid people doing a public duty on the Civil Service Commission are intelligent people of the utmost integrity and concern for the well-being of the city and its people.

But the Civil Service laws that we all have to work with are archaic and somewhat Byzantine. What needs to be done is something the committee cannot do, but what the City and its able staff can begin to do and I feel must do; start the process of Civil Service reform that should have started years ago.

If you establish that the only way a fireman or firewoman can get promoted to Lieutenant or Captain is to be by exams and if you have ensured that the $100,000.00-plus test is as fair as it can be in every way, how can the City then ask that to be thrown out because it does not like the results?

You all agree that the results of this test are disparate in that more whites passed than minorities. The City acknowledged that it did everything [64] for the test to be fair, hired a test-giver with excellent credentials, had pre-assessment done in the city before the test was written, and the test itself had every question coming from the books that were used for study.

We all can have no idea if that test was given again what the results might be. If the results are the same, are we going to throw out every single exam? I say no. The answer that you want to change the racial disparity in the fire department and other departments is you have to find a better solution in the future.

Civil Service was introduced to public management in the U.S. in 1883. All 50 states adopted Civil Service since that time. But it has become very apparent that Civil Service Boards have become an obstacle rather than the solution for cities and states.

A large number of cities and states have adopted Civil Service reform. Some of them are right here in Connecticut. Three states, Florida, Texas and Georgia, have totally eliminated Civil Service. I urge the City, Mr. Chairman, to read and study these reforms.

I feel very strongly that we should have a more diverse fire department both at the entry and [65] promotional levels. It cannot be done by saying that the Civil Service tests are standing – throwing them out when the results are not what is wanted and then not looking for reform in the future.

I ask the City, the Mayor, the Chief Administrator, the Corporation Counsel and City's attorneys, the Chief of the Fire Department, heads of all the City departments, to revamp and reform the current system. It needs to be done on our own city's history so that the healing process in this case can begin and that we can find a better solution.

I know whatever decision is made by my fellow Commissioners that they are the most fair and just people who have worked hard to make this decision on their own for this important matter.

Thank you.

CHAIRPERSON SEGALOFF: Zelma, do you want to make a statement?

MS. TIRADO: No.

CHAIRPERSON SEGALOFF: Mal?

I'd like to say publicly (indiscernible) similar to what Francine –

(Interruption in taping)

CHAIRPERSON SEGALOFF: I started to say a [66] small portion of it may be similar to Francine's view. My guess would be that probably all of us here – and I would probably guess almost everyone out there would agree – that that is – I know there's been other public cases in other communities where there's been very difficult issues similar to this, even more difficult. And they have established – I'm just looking at Chicago. The city established the police department's promotion testing task force. Do good work, but earlier Blue Ribbon panel met and made recommendations regarding selection procedures with the police department for testing, reassess the status of promotional processes and made recommendations to the city of possible different types of examinations, et cetera.

We've said over and again none of us here have any expertise and in designing test exams. I do think it sort of calls out here for us in some fashion to put a group together, whatever is decided here, to try to deal with this issue in a – with a large – in a larger manner than the way we've dealt with it before.

I want to make a couple of other observations. These are all – well, one is personal. And that is that I don't give any credibility personally to somebody sort of claiming innuendoes we've heard [67] bounced around here about a variety of issues. And it won't affect my decision.

One, the result is that some people studied and some didn't bother to study. I've sat here at public hearings. There's no credible evidence at all that these results came about because a group of people really didn't make the effort and didn't study. So that's – I get terribly insulted. But, beyond that, there's evidence of that whatsoever.

Secondly, there is no evidence that I've heard, credible evidence, of people cheating, of taking reference material in advance of others, of being provided questions in advance of tests. Those are very serious allegations. And there's nothing that I've heard here that would convince that that went on.

If I did hear that or I was convinced that there was those kinds of violations, then how could I possibly certify a test with that kind of behavior? So that – I just have to stress that because that wasn't seen.

And I think – I'm sure that everybody sitting on this Commission believes very, very deeply – and you look at some of our histories on how we did and what we've done in our lives, I think you'll see that the [68] statement is true. Everyone of us believes deeply in the importance of diversity and a diverse – you have a diverse community and a diverse fire department. And whatever decision is made is no reflection on our commitment or interest in seeing a diverse fire department.

And there was one poem that I read in one of these cases that really sort of hit me. "The effective participation by members of all racial and ethnic groups in the civic life of our nation is essential, is the dream of one nation, indivisible, is to be realized. The benefits" – and some of these cases go on and I believe, every word of this. "The benefits of diversity are substantial. And it's even more compelling, the need for diversity, in a metropolitan area (indiscernible) important to have a diverse fire department, whatever decision we very much believe that.

I don't have anything further as a statement.

Anyone else?

Well, I guess we should – I would suggest that we just start off with a motion either – I'm not sure where everybody is on this. Do you want to make a motion?

[69] MS. CAPLAN: I make a motion to certify the exams.

CHAIRPERSON SEGALOFF: Do we have a second?

I'll second.

You know what we should do? We should declare there's two exams. So why don't you just start off with one of them?

MS. CAPLAN: I make a motion to certify the Lieutenant's exam.

CHAIRPERSON SEGALOFF: I'll second.

Why don't we have discussion to the extent that anybody wants to say anything. This is an open forum.

MR. WEBBER: I consider this call a very narrow one. I originally was going to vote to certify. That was my original feeling before we got into the testimony. But I've heard enough testimony here to give me great doubts about the test itself and the testing – some of the procedures. And I believe we can do better. In fact, it's been testified in front of us tonight by the Human Relations Director of the City that we can do better.

Therefore, I will vote No on this motion [70] in order to move forward a deeper research and a complete study of how we're giving these exams because of the complete and rather horrifying disparate result of this particular examination.

CHAIRPERSON SEGALOFF: Any other –

MS. TIRADO: I also feel that the process was flawed, with the test as part of that process. I also think the test was flawed. So I'm also going to vote No, that we do not certify the this.

CHAIRPERSON SEGALOFF: Well, this looks like it's going to be two/two. But I'm going to speak in favor of certifying today. I feel it's important I need to – I think Tom Ude's advice to us and thoughts to us from a legal standpoint was very, very helpful to us. And I really agree that he captured what the legal issues are. As a lawyer, I can't help but think in a lot of those terms. At the end of the day, though, I come out with a different conclusion than Tom. And I just have to share that.

I think that, clearly, as said at the outset, this result is not helping, it's not (indiscernible) diversity at this point. But I've got to do – I can't just stop there, obviously, and say, "This is bad." So, let's do another another tests. So I try [71] to follow the lines that I've read from other cases that Tom has instructed us to look at. And that is that there is a disparate impact. That's an easy. Secondly, the issue of the exam being job-related, I, as a lay person, I can't sit here and find that this exam was not job-related. I read the exam. I listened particularly to the firefighter who came from, Maryland, Mr. Lewis, who said the exam was fine.

And I didn't really hear any testimony that compelled to say this exam was not job-related and, therefore, we should throw it out.

So I think, to the final issue, as I understand the law and as I will quote in a case – this was one case that came down last month in Chicago – a couple of months ago that did not throw out the exam. It said, "The remaining issue is by the existence of a substantially equal, valid, less discriminatory alternative employment practice or employment test." And the burden is on the complainant, if you will, at least in that legal sense, to demonstrate that there is an exam that could be designed that's going to be less discriminatory. Demonstrate.

So maybe this is a classic example. We all heard the same testimony from others. But nobody [72] convinced me that we can feel comfortable that, in fact, there's some likelihood that there's going to be an exam designed that's going to be less discriminatory. And that – that does it for me pure and simple.

I – we have a vote of two to two. I'm going to go through the process on the other exam, on the Fire Captain exam. So, as I see it, the exam should not be certified because it's two to two.

Anybody have any comments on this part of it?

Let's go through the next part of the process. Francine, you might as well make a motion as to the other –

MS. CAPLAN: I make a motion that the Captain's exam be certified.

CHAIRPERSON SEGALOFF: I'll second it.

I don't think that we need to do any more other than, I would suggest that the testimony that we all made, to whatever extent we did, on the fire – the other exam is made a part of the testimony for this exam.

I'll second it.

And all in favor? We have two.

And Zelma and Mal, you're opposed.

I don't think there's anything – any [73] other way to – anything else to say. I'm not whining about it. It's been very, very difficult. I am personally saddened by any – vote here. We took on this responsibility and we try our very best to exercise our obligations in a fair and meaningful way. I guess you could – we all sat and we tried very hard to think this all through and came out two to two.

So thank you very much.

MS. TIRADO: I make a motion to adjourn the meeting.

CHAIRPERSON SEGALOFF: Second.

All in favor?

VOICES: Aye.

(Whereupon, the meeting was adjourned at 8:05 P.M.)

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

FRANK RICCI, ET AL,	:	
Plaintiffs,	:	3 04CV01109 (MRK)
-versus-	:	
JOHN DESTEFANO, ET AL,	:	
Defendants	:	

Deposition of NOELIA MARCANO, taken pursuant to Rule 30(b) of the Federal Rules of Civil Procedure, at the LAW OFFICE OF KAREN LEE TORRE, 51 Elm Street, Suite 307, New Haven, Connecticut, before Julia G. Flynn, a Licensed Certified Shorthand Reporter and a Notary Public in and for the State of Connecticut, on Wednesday, August 31, 2004, at 10:20 a.m.

* * *

[179] Q All right. In your analysis of previous exams in the fire department, did you detect any patterns with respect to the oral scores achieved by African Americans when compared to their actual written scores in the portion of the exam where you cannot have a number on the scale?

A What I recall by way of patterns in comparing the written and oral exams is that candidates tend to

do, in most cases, or score a little bit higher in the oral examination, for various reasons.

Q My question is did you detect any [180] particular pattern that stands out in respect to African Americans as opposes to whites?

A No.

Q You're sure about that?

A I already stated that so far as patterning and comparing the written and the oral, candidates tend to perform or score a little higher on the oral exam than on the written.

* * *

[188] Q With respect to the 1999 lieutenant's exam, you looked at a document earlier, an adverse impact analysis, correct?

A Yes.

Q That's not the first time you have seen that, right?

A Yes.

Q And, well, it's not the first time you have seen it?

A Yes, it's not.

Q And the testing consultant clearly showed that you were below the our-fifths rule in that exam, correct?

A Yes.

Q And yet, you didn't do anything to stop an eligible list from being published, did you?

A No.

Q So would it be fair to say that just because an exam produces score results, when viewed along the lines of race, that reveals a [189] problem with the four-fifths rule, doesn't mean that you scuttle the results, does it?

MR. ROBERTS: Objection.

Q Let me rephrase the question. I don't like the way I phrased it.

A Okay.

Q With respect to the 1999 Adverse Impact Analysis, if anything, isn't it true that it shows that just because the analysis shows that the four-fifths rule is implicated, does not per se mean a necessity to discard the results, correct?

MR. ROBERTS: Objection. You can answer.

A Based on the pass/fail rates and performance of the groups that comprise the candidate pool, no, merely based on test results, another thing we factor in the selection rates.

Q Okay. But let's stick with the four-fifths rule. You don't contend that the 1999 lieutenant's exam

implicated a failure to meet the four-fifths rule, correct?

A It did not meet the four-fifths rule.

Q All right. And you agree that that alone did not justify, and would not justify, [190] discarding the results?

MR. ROBERTS: Objection.

Q Correct?

A That alone.

Q Excuse me?

A That alone would not.

Q However, even though the 1999 results implicated the four-fifths rule, there were no board hearings into that test, were there?

A No, there were not.

Q There was no extensive analysis and investigation into the test, was there?

A No.

* * *

[192] Q And who had a hand in selecting the three so-called professionals who appeared before the board?

A I believe there was input sought from City administration, from our office, from Local 825.

Q Who ultimately chose the people to have been?

A The Civil Service Board.

[193] Q Was any recommendation given to them?

A To the extent that there were individuals suggested by, again, City administration, our department, Local 825, if that can be characterized that way.

* * *

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

FRANK RICCI, MICHAEL BLATCHLEY, GREG BOIVIN, GARY CARBONE, MICHAEL CHRISTOFORO, RYAN DIVITO, STEVEN DURAND, WILLIAM GAMBARDELLA, BRIAN JOOSS, JAMES KOTTAGE, MATTHEW MARCARELLI, THOMAS J. MICHAELS, SEAN PATTON, CHRISTOPHER PARKER, EDWARD RIORDON, KEVIN ROXBEE, TIMOTHY SCANLON, BENJAMIN VARGAS, JOHN VENDETTO AND MARK VENDETTO

Plaintiffs,

V.

JOHN DESTEFANO, KAREN DUBOIS-WALTON, THOMAS UDE, JR., TINA BURGETT, BOISE KIMBER, MALCOLM WEBER, ZELMA TIRADO AND THE CITY OF NEW HAVEN,

Defendants.

CIVIL ACTION NO. 3:04CV01109 (MRK)

March 30, 2005

AMENDED COMPLAINT

(Filed May 26, 2005)

1. This civil action is brought to redress the deprivation by defendants of rights secured to the plaintiffs by the Constitution and laws of the United States and the Constitution and laws of the State of Connecticut. The plaintiffs, all firefighters employed by the City of New Haven, have been unlawfully denied promotions and opportunities for promotions on account of their race and political association. This action further seeks declaratory and injunctive relief and damages against the defendant City of New Haven to redress the deprivation of rights secured to plaintiffs by Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, *et seq.*, as amended. (Hereinafter "Title VII") Plaintiffs seek a declaratory judgment, an injunction to restrain the City of New Haven from maintaining or continuing in its practices, policies, customs and usages which discriminate against plaintiffs and members of the class that they represent because of their race with respect to promotions in the classified civil service.

2. Injunctive and declaratory relief, damages and other appropriate legal and equitable relief are sought against the defendant City of New Haven pursuant to §706(g) of Title VII, 42 U.S.C. §2000e-5(g).

3. This action is brought pursuant to 42 U.S.C. §1983. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§1331, 1333. With respect to the causes

asserted against the defendant City of New Haven under Title VII, the jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1343(4), 42 U.S.C. §2000e-(5) and 29 U.S.C. §626(c). The plaintiffs further invoke the supplemental jurisdiction of this Court with respect to those causes of action arising under the laws of the State of Connecticut.

4. At all times relevant to this complaint, the defendant John DeStefano was and remains the Mayor of the City of New Haven and was acting under color or pretense of law, to wit: under the Charter, regulations, customs and usages of the City of New Haven. In his said capacity, the defendant DeStefano has chief executive authority over the affairs of the City of New Haven, the employment of municipal personnel and enforcement of the City Charter and rules and regulations of the City's various boards and commissions.

5. At all times relevant to this complaint, the defendant Karen Dubois-Walton was the Chief Administrative Officer of the City of New Haven. In said capacity, the defendant had overall administrative responsibility and authority with respect to the affairs of the City of New Haven, the conduct of all subordinate city officials, the enforcement of the City's charter and rules and regulations of the City's various boards and commissions. At all times relevant to this complaint, the said defendant was acting under color or pretense of law, to wit: under the Charter, regulations, customs and usages of the City of New Haven. The defendant Dubois-Walton is a

political appointee of the Mayor, reports directly to the defendant DeStefano and acts as a political operative for the Mayor by carrying out the Mayor's policies, political agenda and municipal policies.

6. At all times relevant to this action, the defendant Thomas W. Ude, Jr., was and remains the Corporation Counsel for the City of New Haven and in said capacity was acting under color or pretense of law, to wit: under the Charter, regulations, customs and usages of the City of New Haven.

7. The defendant Ude is a political appointee and was appointed to his position by the defendant DeStefano. In his position as Corporation Counsel, defendant Ude has overall responsibility for the management of the City's legal office, the representation of the City in all legal matters and the further responsibility of ensuring, along with the other defendants, that the City and its officials obey the provisions of the City's Charter and the rules and regulations of its various boards and commissions. By provision of the charter, the defendant Ude reports directly to the Mayor, advances the Mayor's position on various legal matters and further acts as a political operative for the Mayor by carrying out the Mayor's policies and political agenda.

8. At all times relevant to this action, the defendant Tina Burgett was the Director of Personnel for the City of New Haven and in said capacity was acting under color or pretense of law, to wit: under the Charter, regulations, customs and usages of the

City of New Haven. The defendant Burgett reports to the defendants DeStefano and DuBois-Walton and carries out the policies and decisions of the Mayor with respect to matters of municipal employment. Defendant Burgett is further responsible for enforcing the provisions of the City Charter and applicable civil service regulations with respect to hiring and promotion of municipal employees in the City's classified civil service.

9. At all times relevant to this complaint, the defendants Malcolm Weber and Zelma Tirado were members of the Civil Service Board of the City of New Haven and in said capacity were acting under color or pretense of law, to wit: under the Charter, regulations, customs and usages of the City of New Haven. The Civil Service Board of the City of New Haven (hereinafter "Board") was established by authority of the City Charter and is comprised of five members, all of whom are appointed by the Mayor of the City of New Haven. The Board is responsible for carrying out and enforcing the provisions of the City Charter respecting the hiring and promotions of individuals in the City's classified service.

10. At all times relevant to this action, the defendant Boise Kimber was a member of the Board of Fire Commissioners of the City of New Haven and in said capacity was acting under color or pretense of law, to wit: under the Charter, regulations, customs and usages of the City of New Haven. The defendant Kimber is a political appointee of the defendant DeStefano and was chosen by the Mayor to serve as

Chairman and later Commissioner of the City's Board of Fire Commissioners. In said capacity, the defendant Kimber has supervisory and administrative control and authority over the affairs of the Fire Department of the City of New Haven, firefighters and other personnel employed by the Department of Fire Services.

11. At all times relevant to this complaint, the defendant City of New Haven (hereinafter "City") was a municipal corporation duly organized and existing under the laws and Constitution of the State of Connecticut. The City was and is the employer of the plaintiffs and liable for the acts and omissions of its officials, representatives, agents and administrators.

12. The acts and omissions of the defendants and each of them as complained of herein were committed under the guise and pretense of municipal authority and pursuant to official practices, customs and policies of the City which are designed and operate to discriminate against municipal employees on the basis of race and political affiliation.

13. The plaintiffs are employees of the City and members of the City's classified civil service. All of the plaintiffs are employed as firefighters in the Department of Fire Service. The plaintiff Benjamin Vargas is Hispanic. All of the other plaintiffs are white. The majority of the plaintiffs live outside the boundaries of the City, are not members of the defendant DeStefano's political constituency and are not a source of political support for him.

14. The City of New Haven is governed by a charter the provisions of which are established and approved by the voters of the City of New Haven in an exercise of democratic will. The Charter has the force of law and all elected and appointed officials and agents of the City are mandated to respect and carry out its provisions. In particular, the Charter charges the Mayor with the duty of causing all laws and ordinances to be executed and enforced. The Mayor is further responsible for the good order and efficient government of the city.

15. The Charter provides for the establishment of a classified civil service and all positions in city government within the classified service are subject to the various charter provisions and Civil Service Board rules respecting the hiring and promotion of individuals in the classified service. The position of firefighter falls within the classified service.

16. To avoid to the greatest extent possible the ills of the old spoils system, to wit: invidious discrimination, nepotism, cronyism, political horse-trading, graft and bribery, the Charter provides for a strictly merit-based system for the promotion of municipal employees in the classified service.

17. Article XXX, §167 of the Charter provides that all promotions in the classified service shall be made according to merit and fitness to be ascertained so far as practicable by competitive examination.

18. Article XXX, §172 of the Charter expressly mandates that no person in the classified service

shall be appointed, promoted or in any way favored or discriminated against because of race, sex, age, national origin, or political or religious opinion or affiliation. The said section further provides that no person shall willfully or corruptly make any false statement, certificate, mark, rating or report in regard to any test, certification, promotion, reduction, removal or appointment held or made under the provisions of the charter or in any manner commit or attempt to commit any fraud preventing the impartial execution of the rules and regulations respecting the merit-based examination process.

19. The Charter further expressly provides that no person shall either directly or indirectly pay, render or give any money, service or any valuable thing to any person, for or on account of or in connection with any test, appointment, or promotion. A violation of this provision constitutes a criminal offense punishable by fine and imprisonment.

20. Article XXX, §166 of the Charter charges the Personnel Director of the City with the duties of preparing, conducting and scoring examinations of qualified applicants for all positions in the classified service and certifying the results of such examinations to the members of the Civil Service Board. The Personnel Director is further required to determine the eligibility of applicants for all positions in accordance with the Charter and rules established by the Civil Service Board and to maintain records of all applicants, their qualifications and scores.

21. Consistent with establishment of a merit-based system of hiring and promotion, Article XXX, §160 of the Charter, as well as the rules and regulations of the Board, provide that no promotion within the classified service shall be made except from among those applicants with the three highest scores of those who shall have passed a competitive examination with a score of at least seventy percentum and are upon the eligible list established by the Director of Personnel and the Board. This requirement is commonly known and referred to as the "Rule of Three".

22. For some ten years, the City of New Haven, acting through its officials, among them the defendants herein, engaged in a pattern of repeated violations of the Rule of Three for the improper and unlawful purpose of engaging in race-based discrimination and political favoritism in the appointment and promotion of individuals in the classified service. As a result of its repeated and persistent lawbreaking, the City and various of its officials were named defendants in several civil actions brought in the Superior Court for the Judicial District of New Haven by municipal employees who were victims of the City's violations of its Charter.

23. In each case where the City's practice of violating the Rule of Three was challenged, the plaintiffs in all such civil actions prevailed in their efforts to seek temporary and permanent injunctive relief against such illegal practices. The defendants herein, intent on persisting in the illegalities

complained of in this action, proceeded boldly and brazenly to ignore the opinions and orders of the judges of the Superior Court for the Judicial District of New Haven. In consequence certain plaintiffs sought and gained a permanent injunction and final judgment against the City enjoining the City from further violations of the Rule of Three.

24. For the purpose of filling vacancies in the promotional ranks of its fire department, the City, in accordance with the Charter, administered competitive examinations for promotions to the ranks of lieutenant and captain.

25. The plaintiffs Gary Carbone, William Gambardella, Brian Jooss, James Kottage, Matthew W. Marcarelli, Thomas J. Michaels, Edward Reardon, Kenneth Roxbee, Timothy Scanlon, Benjamin Vargas and John Vendetto competed in the examination process for promotion to the rank of captain. The plaintiffs Frank Ricci, Michael Blatchley, Greg Boivin, Michael Christoforo, Ryan DeVito, Steven Durand, Sean Patton, Christopher Parker and Mark Vendetto competed in the examination process for promotion to the rank of lieutenant.

26. The plaintiffs expended money and time in preparation for the examinations. They gave up much of their leisure time and time with family and friends in order to study for the examinations.

27. The competitive examination consisted of two components, a written examination and an oral

examination. With respect to the position of lieutenant, a written examination was administered on or about November 22, 2003 and an oral examination was administered on or about December 13, 2003 to all those eligible to compete. With respect to the position of captain, a competitive written examination was administered on or about November 21, 2003 with the oral examination administered on or about December 14, 2003 to all those eligible to compete. With respect to all of these examinations, the City contracted with and engaged the services of a professional corporation which employs personnel possessed of expertise in the field of formulation and administration of competitive civil service employment examinations. The City expended the approximate sum of $100,000.00 in payment of professional fees for such purpose and the examinations were prepared upon input of city officials and fire department personnel. The form and content of the examinations were approved by the defendants, who determined that the examinations were appropriately related to the knowledge, skills and abilities necessary to competent performance of the duties of both positions.

28. Consistent with the Charter's mandate that promotions be based upon merit and without regard to race or other improper factors, applicants participating in the examination process were assigned an identification number and no other characteristics of an examinee, including his/her race, age, gender or ethnicity, were made available or known to the test administrators. On or about January 22, 2004, the

scores achieved by all examinees were reported to the defendants by reference to the identification number of each examinee.

29. Upon information and belief the defendant Burgett, together with the City's Chief Examiner, Noelia Marcano, upon receipt of the scores from the test administrators, proceeded to peruse through personnel files and other city documents for the purposes of ascertaining the race and ethnicity of each applicant and labeling each applicant in accordance with what they believed or suspected to be his/her race and ethnicity. The defendant thereafter compiled another list of examinees identified only by assigned number which indicated each individual's score and his/her race as perceived by defendants.

30. The aforesaid list was published and circulated among city officials. Upon review of the list, with its labeling of candidates on the basis of race, the defendants alleged that white firefighters were the top scorers in both competitive examinations.

31. The defendants herein, having been enjoined by a judge of the Connecticut Superior Court from further violations of the City Charter and the Rule of Three, were obligated by court order to promote employees in strict accordance with the Charter. With respect to the promotional examinations for the ranks of captain and lieutenant, compliance with the law and the Charter would have required the promotion of the plaintiffs and/or consideration of them for

promotion under the Rule of Three without regard to race, ethnicity or political opinion or affiliation.

32. Compliance with the Charter, and thus promotion of those deemed most fit based on merit, would have resulted in white and Hispanic firefighters being promoted first given the number of then-existing vacancies in the promotional ranks. The defendants thus embarked on a course of conduct designed to avoid and/or evade compliance with their legal obligations. The defendants and each of them collaborated and conspired with one another to cause the City to discard the examination results and fail and refuse to establish an eligible list for promotion to the ranks of captain and lieutenant.

33. The defendant DeStefano was subjected to pressure and lobbying by leaders of New Haven's African-American community including, but not limited to, defendant Boise Kimber and certain minority members of the City's Board of Aldermen,

34. The defendant Kimber is an African-American and a minister who leads a large congregation in the City of New Haven comprised largely of African-Americans. The defendant Kimber has long been active in Democratic party politics and is a political ally and operative for the defendant DeStefano. The defendant DeStefano values his relationship with the defendant Kimber who has used his influence as a minister and civic leader to swing support and blocs of votes in favor of defendant DeStefano in his successful mayoral electoral

campaigns. The defendant Kimber, angered that white firefighters would be promoted, proclaimed that the Civil Service Board would certify the test results "over [his] dead body" and proceeded to pressure the Mayor and lobby members of the Civil Service Board with the aim of provoking the Board to violate the Charter and refuse to proceed with promotions based on merit.

35. The defendant DeStefano not only has an interest in re-election to the office of Mayor but has disclosed publically his ambition to be elected Governor of the State of Connecticut. The defendant DeStefano feared that the City's compliance with the Charter and the promotion of firefighters based on merit and without regard to race and political association would engender the anger and retribution of leaders of the African-American community in New Haven and thus jeopardize his political standing and ambition. Defendant DeStefano feared that promotions in the fire department in accordance with the law and free from race-based discrimination and political influence-peddling would result in a withdrawal of political support by the defendant Kimber and other leaders of the African-American community in New Haven.

36. Well aware that his intended course of action was unlawful and wishing to appear neutral and uninvolved, the defendant DeStefano delegated to the other individual defendants, in particular defendants Dubois-Walton and Ude, the task of causing the City to engage in the acts and omissions

complained of. Defendant DeStefano knew that his authority and influence, exerted surreptitiously and through his political appointees and subordinates, would achieve the desired result.

37. As part of their plan to evade compliance with the Charter and violate the rights of the plaintiffs by denying them justly earned promotions, the defendants first attempted to concoct a pretext under which they could deny promotions to the plaintiffs by discarding the examination results for a seemingly legitimate reason. Toward this end, defendants attempted unsuccessfully to solicit evidence of irregularities and/or cheating during the examination process. No evidence whatever existed, however, to support such a claim and the defendants thereafter sought to concoct other seemingly valid reasons to discard the test results, among them a suggestion that one or more minority firefighters who competed in the examinations was deprived of access to necessary information and/or study materials pertinent to the test by the act or failure of a city official or agent. When the defendants understood that such claim was likewise invalid, defendants resorted to behind-the-scenes lobbying and exertion of political pressure on the members of the Civil Service Board for the purpose of influencing the Board to engage in the unlawful acts complained of.

38. The defendant Ude, at the direction and with the approval of Defendant DeStefano, proceeded to collaborate with defendants Burgett and Dubois-Walton to influence and provoke the Civil Service

Board to violate the Charter, the state and federal constitutions, and state and federal law prohibiting race discrimination in employment and adverse employment actions on account of political expression and affiliation.

39. The defendant Ude made public remarks to the Board and the broadcast and print media which were designed to intimidate and influence the politically appointed members of the Civil Service Board, comments that were insulting and inflammatory and designed to make Board members afraid to discharge their legal obligation under fear of being labeled by City officials and others as "bigots".

40. The defendants Ude, Dubois-Walton and Burgett, acting at the direction of the Mayor and pursuant to the Mayor's policy, further proceeded to communicate and conspire to devise a strategy to produce the results desired by the Mayor which was a refusal by the Board to carry out its duty to establish an eligible list and permit promotions to be made. Through e-mail communications and surreptitious meetings, the defendants Ude, Dubois-Walton and Burgett conspired and acted to cause the City to refuse to establish an eligible list and thus prevent the plaintiffs from receiving promotions to which they were lawfully entitled. Defendants acted covertly in a manner designed to disguise the fact that the defendant DeStefano had dictated such course of action with the unlawful aims of discriminating against employees on the basis of race and rewarding with promotions those firefighters who are constituents of

African-American leaders, friends or relatives of the Mayor's political supporters and contributors, and friends or relatives of certain members of the City's Board of Aldermen.

41. Defendants thereafter engaged the services of several professionals and/or academics for the alleged purpose of reviewing the examinations and offering an opinion as to their fairness. The defendant Burgett attempted improperly to influence these professionals in advance of their formulation of an opinion by providing them with selected media reports and publications which she hoped would persuade the professionals to offer an opinion upon which the City may justify a refusal to certify the examination results. To the defendants' disappointment, however, none of these individuals offered an opinion that the examinations were not pertinent to the duties and responsibilities of the promotional positions or were otherwise unfair. The defendants also arranged for the personal appearance before the Civil Service Board of a representative of the firm which devised and administered the examinations who, in an extensive presentation to the Board, assured board members that the subject matter and content of the examinations were appropriate and the testing process fair to all who competed.

42. Despite all of the above facts, on or about March 18, 2004, the defendants, acting through the members of the Civil Service Board, opted to discard the examination results and refuse to establish an

eligible list. As a result, none of the plaintiffs will be promoted or considered for promotion.

43. On diverse dates from January 22, 2004 until the date of the commencement of this action, the plaintiffs demanded disclosure of their individual scores for the purpose of determining their relative positions and ranks on the eligible list required by the Charter and the rules of the Board. Believing that their civil and constitutional rights were violated by the defendants, each plaintiff further wished to determine his standing to commence an administrative proceeding and/or civil action to redress his injuries.

44. The defendants were aware that those whose rights were violated and who suffered injury on account of defendants' unlawful acts would possess and may pursue causes of action as to which applicable statutes of limitation would require the plaintiffs to act promptly or suffer foreclosure of their rights.

45. The defendants aimed to thwart any scrutiny of their conduct in relation to the examination scores. Defendants further aimed to keep the plaintiffs in a state of uncertainty and confusion regarding their performance in the examinations and the extent to which their rights were violated by defendants. With ill motive, defendants conspired unlawfully to deny plaintiffs access to information regarding their scores with the foreknowledge that said conduct would impede plaintiffs' ability to ascertain their

rights and commence an administrative or civil proceeding to vindicate such rights.

46. Although the Charter, Civil Service Board rules and City policies allowed for the right of the plaintiffs to disclosure of their scores and despite the fact that the city and its officials had previously been admonished by state authorities for unlawfully refusing employees access to their examination scores, the defendants maliciously deprived and continue to deprive the plaintiffs of this information for the purpose of causing the plaintiffs to suffer distress and for the further unlawful purpose of frustrating and impeding plaintiffs' access to the agencies and courts of the State of Connecticut for redress of their injuries.

47. Each of the plaintiffs had an absolute right protected by the First Amendment to the United States Constitution and by article first, section 4 of the Constitution of the State of Connecticut to choose not to be a political supporter of the defendant DeStefano, to refrain from activities on behalf of the Democratic Party in New Haven and to refrain from association with those whose manage and support the defendant DeStefano' s campaigns for political office.

48. Each of the plaintiffs have the right under the Charter of the City of New Haven to promotion, opportunities and consideration for promotion on the basis of merit and free from favoritism and discrimination on the basis of their race, ethnicity or political association or affiliation.

49. By the acts and omissions of the defendants as complained of herein, the plaintiffs were deprived of their right to equal protection of the laws and equal privileges as guaranteed by the Fourteenth Amendment to the United States Constitution.

50. By the acts and omissions of the defendants as aforedescribed, the plaintiffs and each of them were deprived of their property interests without due process of law in violation of the Fourteenth Amendment to the United States Constitution.

51. By the acts and omissions aforedescribed, the defendants violated the plaintiffs' rights to freedom of speech as guaranteed by the First Amendment to the United States Constitution.

52. By the acts and omissions aforedescribed, the defendants violated the plaintiffs' rights to freedom of association as guaranteed by the First Amendment to the United States Constitution.

53. By the acts and omissions aforedescribed, the defendants violated the plaintiffs' rights to freedom of expression as guaranteed by article first, section 4 of the Constitution of the State of Connecticut.

54. Each of the acts and omissions of the defendants as aforedescribed constituted intentional, extreme and outrageous conduct which defendants knew was likely to cause the plaintiffs to suffer severe emotional distress. As a direct and proximate

result of defendants' tortious conduct, the plaintiffs and each of them suffered severe emotional distress.

55. At all times relevant to this complaint, the defendants and each of them acted willfully and intentionally and/or with reckless disregard of whether their conduct violated the plaintiffs' civil and constitutional rights.

56. In the manner aforedescribed, the defendants and each of them violated the provisions of 42 U.S.C. Section 1983 to the injury of the plaintiffs.

57. The defendants conspired with one another to violate the civil and constitutional rights of the plaintiffs and in so doing violated the provisions of 42 U.S.C. Sections 1983 and 1985 to the injury of the plaintiffs.

58. At all times relevant to this complaint, each defendant had the duty to intervene and prevent another defendant from engaging in the unlawful acts and omissions complained of herein. Each defendant failed to discharge this duty to the injury of the plaintiffs.

59. The aforedescribed acts and omissions of the defendants were committed pursuant to and as a part of an official policy, custom and practice established by the City of New Haven with the purpose and effect of depriving the plaintiffs and others similarly situated the aforesaid civil and constitutional rights on the unlawful bases of race, ethnicity, expression, association and political affiliation. As a direct and

proximate result of the official policy and practices of the City of New Haven as complained of herein, the plaintiffs and each of them have suffered injury.

60. The defendant City of New Haven is an employer and covered entity within the meaning of 42 U.S.C. §2000e(b). At all times, the City was prohibited by Title VII from failing or refusing to promote or otherwise discriminating against any of the plaintiffs with respect to his compensation, terms, conditions or privileges of employment because of such individual's race or national origin.

61. The plaintiffs herein have complied with all administrative prerequisites to suit under Title VII by the timely filing of administrative complaints with the Connecticut Commission on Human Rights and Opportunities ("CHRO") and the Equal Employment Opportunities Commission ("EEOC"), by receipt of a Right to Sue letter from the EEOC through the United States Department of Justice and the bringing of this cause of action in the United States District Court within ninety (90) days of their receipt thereof.

62. By the aforesaid acts and omissions complained of, the City of New Haven, in depriving the plaintiffs of promotions and opportunities for promotions on account of their race, violated the plaintiffs' rights to be free from discrimination in employment on account of their race and/or national origin in violation of 42 U.S.C. §2000e-2(a)(1), (2), and 3(b). In further violation of said provisions of Title VII, the City of New Haven has also engaged in a practice by

which it knowingly permits the skewing of assessments and scoring on the oral component of the examination process in favor of African-American candidates and in disfavor of white candidates. The conduct of the City in this respect has resulted in an overall depression of examination scores for white candidates undergoing oral examination in contradiction to their actual examination performance, which thus serves to dilute the white candidates' chances for promotion.

63. As a direct and proximate result of the acts and omissions of the defendants as afore-described the plaintiffs suffered the following injuries, including, but not limited to:

a. Denial of promotion;

b. Denial of fair consideration for promotion;

c. Denial of opportunities for promotion;

d. Loss of income, pension accruals and other benefits attendant to promotion;

e. Loss of money and time expended in connection with preparation for and participation in the examinations;

f. Inconvenience, annoyance, burden and time away from family and leisure activities associated with unsuccessful efforts to secure defendants' compliance with the law and their right to disclosure of their examination scores;

g. Damage to their careers and standing in their profession;

h. Impeded and foreclosed opportunities for further promotion to higher ranks of the New Haven Fire Department;

i. Severe emotional distress, anxiety and upset;

j. Other intangible injuries associated with the violation of their civil and constitutional rights.

Wherefore, the plaintiffs demand judgment against the defendants and each of them and further relief as follows:

a. Compensatory damages in an amount which a jury shall determine to be just and reasonable;

b. Punitive damages in an amount which a jury shall determine to be just and reasonable;

c. Reasonable counsel fees and the costs of this action;

d. A declaratory judgment declaring the challenged practices unlawful and a permanent injunction enjoining the defendants from persisting in the challenged practices;

e. Pre-judgment and post-judgment interest as allowed by law; and

f. Such further relief as law and equity may afford.

THE PLAINTIFFS,

BY: /s/ Karen Lee Torre

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UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

FRANK RICCI, MICHAEL BLATCHLEY, GREG BOIVIN, GARY CARBONE, MICHAEL CHRISTOFORO, RYAN DIVITO, STEVEN DURAND, WILLIAM GAMBARDELLA, BRIAN JOOSS, JAMES KOTTAGE, MATTHEW MARCARELLI, THOMAS J. MICHAELS, SEAN PATTON, CHRISTOPHER PARKER, EDWARD RIORDON, KEVIN ROXBEE, TIMOTHY SCANLON, BENJAMIN VARGAS, JOHN VENDETTO AND MARK VENDETTO

Plaintiffs,

V.

JOHN DESTEFANO, KAREN DUBOIS-WALTON, THOMAS UDE, JR., TINA BURGETT, BOISE KIMBER, MALCOLM WEBER, ZELMA TIRADO AND THE CITY OF NEW HAVEN,

Defendants.

CIVIL ACTION NO. 3:04CV01109 (MRK)

March 30, 2005

DEMAND FOR JURY TRIAL

The plaintiffs hereby demand a trial by jury on all issues.

THE PLAINTIFFS,

BY: /s/ Karen Lee Torre

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Their Attorney

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

FRANK RICCI, ET AL. plaintiffs	:	
v.	:	NO: 3:04-CV-1109 (MRK)
JOHN DESTEFANO, JR., ET AL. defendants	:	AUGUST 29, 2005

ANSWER AND AFFIRMATIVE DEFENSES

1. Admit that this is a civil action which seeks declaratory and injunctive relief and damages. Admit that the action alleges a deprivation by defendants of certain rights but deny that any such deprivation occurred. Admit that the plaintiffs are all firefighters employed by the City of New Haven but deny all other allegations of paragraph 1.

2. Admit.

3. Admit.

4. Admit.

5. As to that portion of paragraph 5 which states, "At all times relevant to this complaint, the defendant Karen Dubois-Walton was the Chief Administrative Officer of the City of New Haven" and "The defendant Dubois-Walton is a political appointee

of the Mayor, reports directly to the defendant DeStefano . . . by carrying out the Mayor's policies, political agenda and municipal policies." is admitted. As to the rest and remaining portion of paragraph 5, it is denied. It is further admitted that Karen Dubois-Walton had supervisory responsibility over six city departments.

6. Admit.

7. Admit the first sentence. Admit that in his position as Corporation Counsel, defendant Ude has general overall responsibility for management of the City's legal office and has such further responsibilities as are set forth and described in Section 18 of the City Charter and otherwise deny the remaining allegations to the extent they are inconsistent with those duties.

8. Admit the first sentence. Admit that defendant Burgett as Personnel Director has the powers and duties as set forth and described in Section 166 of the City Charter and otherwise deny the remaining allegations to the extent they are inconsistent with those duties.

9. Admit.

10. Admit the first sentence, admit that defendant DeStefano appointed defendant Kimber to the Board of Fire Commissioners and that defendant Kimber served as that Board's Chair and deny the remaining allegations of the paragraph.

11. Admit the first sentence and admit that the City was and is the employer of the plaintiffs, and deny the remaining allegations of the paragraph as alleged.

12. Deny.

13. Admit the first sentence. Admit, upon information and belief, the plaintiffs' self described ethnicity and that the majority of plaintiffs live outside the boundaries of the City. The remaining allegations are vague in that the terms "political constituency" and "source of political support" are not clear and thus defendants neither admit nor deny the remaining allegations but leave the plaintiffs to their proof.

14. Admit, except note that the Charter is not the only law that governs the City of New Haven and that the Charter states which officials are required to carry out its provisions.

15. Admit and refer to the actual charter for its scope.

16. Admit that the charter provides for a merit based system for promotion of municipal employees in the classified service and refer to the actual Charter for the scope and limits of such system.

17. State that the provisions of the Charter speak for themselves and therefore neither admit nor deny the plaintiffs' paraphrasing of the Charter.

18. State that the provisions of the Charter speak for themselves and therefore neither admit nor deny the plaintiffs' paraphrasing of the Charter.

19. State that the provisions of the Charter speak for themselves and therefore neither admit nor deny the plaintiffs' paraphrasing of the Charter.

20. State that the provisions of the Charter speak for themselves and therefore neither admit nor deny the plaintiffs' paraphrasing of the Charter.

21. State that the provisions of the Charter speak for themselves and therefore neither admit nor deny the plaintiffs' paraphrasing of the Charter.

22. Deny.

23. Admit that there were civil actions challenging the City's interpretation of the Rule of Three but deny the remaining allegations of the paragraph.

24. Admit.

25. Admit.

26. The defendants have insufficient direct knowledge to either admit or deny the allegations of this paragraph and thus leave the plaintiffs to their proof.

27. Admit the first four sentences. Deny the fifth and sixth sentences.

28. Deny.

29. Deny.

30. Deny as stated, but admit that two lists with preliminary scores from the tests that identified race and ethnicity for purposes of evaluating adverse impact circulated among some City officials, and admit that those preliminary lists showed that the top scorers in both examinations were white.

31. Deny.

32. Deny.

33. Deny.

34. Admit the first sentence. Admit the second sentence except deny the term "operative". Admit the third sentence except deny that defendant Kimber can control how anyone other than he himself votes. Deny the fourth sentence.

35. Admit the first sentence. Deny the second sentence. Deny the third sentence.

36. Deny.

37. Deny.

38. Deny.

39. Deny.

40. Deny.

41. Admit that several experts were solicited for their opinions concerning certain aspects of the examinations but deny the remaining allegations of the paragraph.

42. Admit that on or about March 18, 2004 a motion before the Civil Service Board to certify promotional lists to be generated through the tests did not pass. Deny the remaining allegations of the paragraph.

43. With regard to the first sentence, admit that some of the plaintiffs sought disclosure of their individual scores but deny the remaining allegations. With regard to the second sentence defendants can neither admit nor deny the state of mind of the plaintiffs and leave them to their proof.

44. Deny.

45. Deny.

46. Deny.

47. Admit.

48. Deny as stated. State that the provisions of the Charter speak for themselves and therefore neither admit nor deny the plaintiffs' paraphrasing of the Charter.

49. Deny.

50. Deny.

51. Deny.

52. Deny.

53. Deny.

54. Deny.

55. Deny.

56. Deny.

57. Deny

58. Deny.

59. Deny.

60. Admit.

61. The defendants have insufficient direct knowledge to either admit or deny the allegations of this paragraph and thus leave the plaintiffs to their proof.

62. Deny.

63. Deny.

FIRST AFFIRMATIVE DEFENSE

The actions and inactions of the defendants were mandated by federal law and thus any state law claims of the plaintiffs are preempted.

SECOND AFFIRMATIVE DEFENSE

The matter is not yet ripe.

THIRD AFFIRMATIVE DEFENSE

The individual defendants are absolutely immune from suit for the actions alleged in the complaint.

FOURTH AFFIRMATIVE DEFENSE

The individual defendants are qualifiedly immune from suit for the actions and inactions alleged in the complaint.

THE DEFENDANTS
JOHN DESTEFANO, ET AL.

By /s/ [Illegible]

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[Certificate Of Service Omitted In Printing]

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

FRANK RICCI, ET AL,	:	
Plaintiffs,	:	3 04CV01109 (MRK)
-versus-	:	
JOHN DESTEFANO, ET AL,	:	
Defendants	:	

Deposition of KAREN DUBOIS-WALTON, taken pursuant to Rule 30(b) of the Federal Rules of Civil Procedure, at the New Haven City Hall, 165 Church Street, New Haven, Connecticut, before Julia G. Flynn, a Licensed Certified Shorthand Reporter and a Notary Public in and for the State of Connecticut, on September 20, 2005 at 10:20 a.m.

* * *

[134] Q And would you agree with me that when it comes to the protection and saving of life, the protection of the public and property, that it is not in the City's interest to have anyone in the job of fire-fighter, or a higher ranked promotional position, who is either marginal or incompetent?

A I would agree.

[135] Q And do you see any reason why this City should compromise standards for the sake of diversity?

A No.

Q Would you agree that – or do you have any understanding that a lieutenant, even though it's the first level promotion, would at some – on many occasions, be in the position of command of a fire scene?

A Yes, my understanding is that that may occur.

Q And it certainly would occur at the higher level of captain, correct?

A Yes.

Q Is it your position that for the sake of diversity, the City of New Haven should install in either position an African American who may be in fact less competent than a white candidate, for the sake of achieving racial diversity?

A No.

* * *

[138] Q Now, in your statement to the BOA, Board of Aldermen, and in your letter statement to the CSB, did you in fact make a representation that the disparate impact in terms of scoring impact on minorities was much more severe in the 2003 [139] examinations than ever before?

A I understood the combination of the score differences, the number of vacancies and the Rule of Three that put us in a situation unlike one we had experienced before, yes.

Q Well, when – my question was did you make that statement to the Board of Aldermen?

A Can I see the statement?

Q Yes.

A I believe I said the results differ markedly –

Q What was your –

A – from typical –

Q I'm sorry.

A – from typical results.

Q What was your factual basis for making that remark?

A Comparison of previous public safety exams.

Q And you made the comparisons, or were you relying on what Ms. Marcano or somebody else told you?

A Information from Human Resources.

Q Ms. Burgett?

[140] A Well, from – I'm not sure who produced the information. It was somebody in Human Resources, either Ms. Marcano or Tina. I would guess that Ms. Marcano did the actual comparisons.

Q Okay. And similarly, before the CSB, you made a like remark, as did Ms. Burgett and Mr. Ude, that is, –

A That's correct.

Q – that the adverse impact on minorities was substantially more severe than the 2000 exams, as compared to previous exams, correct?

A In front of the Civil Service, I believe what I said was that the combination that wasn't just the – the scores, but the fact that there were few vacancies, and the Rule of Three all combined, led us to a situation where we had a different outcome than other times.

Q So would I be correct therefore in understanding that the representation with respect to the severity of the adverse impact was a function of both the score results, and the number of vacancies which existed in both ranked positions?

A And the Rule of Three, yes.

[141] Q And the Rule of Three. Did either Mr. Ude, Ms. Burgett, or Ms. Marcano, to your knowledge, ever tell you or the mayor, directly or indirectly, through you, that previous promotional exams in the fire departments also resulted in similar scoring disparities between whites and blacks?

A I believe that I was told that we – that there had been times in the past where the pass rates were different, were markedly different. But that we had never been in a situation like we were in at that moment, where we were going to be in a position of being able to promote on one of the exams, solely,

solely Caucasians and on the other exam, potentially, I believe it was one Latino at the time.

Q What was your knowledge – did you understand that there was a previous 1999 lieutenant's examination?

A Yes, I understood that.

Q And what information did you have with respect to the relative passing rates of blacks and whites on that exam?

A Without having my forms in front of me, [142] I remember on the '96 and '99, that there were differences, and I don't remember specifically what the numbers were on either of them.

* * *

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

FRANK RICCI, ET AL. plaintiffs	:	
v.	:	NO: 3:04-CV-1109 (MRK)
JOHN DESTEFANO, JR, ET AL. defendants	:	

AFFIDAVIT

STATE OF CONNECTICUT)
) SS: New Haven
COUNTY OF NEW HAVEN)

I, Noelia Marcano, being duly sworn do depose and say:

1. I am over the age of 18 years and understand the obligations of an oath.

2. I have personal knowledge of the facts contained in this affidavit.

3. I am the Chief Examiner for the City of New Haven; I am also the Secretary to the New Haven Civil Service Board.

4. The document attached hereto is a true and accurate copy of the written summary that I helped

prepare which compares results from previous examinations with the preliminary results from the subject examinations. Said summary was provided to the Civil Service Board at its January 22, 2005 meeting.

/s/ Neolia Marcano
Noelia Marcano

Subscribed and sworn to before me this 27th day October, 2005.

/s/ Pamela M. Popolizio
~~Commissioner of the Superior Court~~
Notary Public
My Commission Expires:
Pamela J. Popolizio,
Notary Public
State of Connecticut
My Commission Expires
6/30/2008

Summary Information

I. Currently, there are 336 members of Fire Suppression Services.

248 Firefighters
51 Lieutenants
21 Captains
7 Battalion Chiefs
4 Deputy Chiefs

Firefighter	**Total**	**%**
White	132	53%
African American	76	30%
Hispanic	40	16%

Lieutenant	**Total**	**%**
White	32	63%
African American	11	22%
Hispanic	8	16%

Captain	**Total**	**%**
White	18	86%
African American	1	4%
Hispanic	2	9%

Battalion Chief	**Total**	**%**
White	5	71%
African American	2	29%
Hispanic	0	0%

Deputy Chief	Total	%
White	3	75%
African American	0	0%
Hispanic	1	25%

II. Fire Lieutenant Examination by Year

# of individuals who passed by year	White	African American	Hispanic
1996	50	13	6
1999	25	8	9
2003	26	6	3

III. Fire Lieutenant Ranks by Race

	White	African American	Hispanic
1996	Rank 1	Rank 3	Rank 4
1999	Rank 1	Rank 5	Rank 1
2003	Rank 1	Rank 13	Rank 26

Captain Examination by Year

# of individuals who passed by year	White	African American	Hispanic
1998	35	7	3
2003	16	3	3

IV. Captain Ranks by Race

	White	African American	Hispanic
19998	Rank 1	Rank 5	Rank 4
2003	Rank 1	Rank 15	Rank 6

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

FRANK RICCI, ET AL. plaintiffs	:	
v.	:	NO: 3:04-CV-1109 (MRK)
JOHN DESTEFANO, JR, ET AL. defendants	:	

AFFIDAVIT

STATE OF CONNECTICUT)
) SS: New Haven
COUNTY OF NEW HAVEN)

I, Noelia Marcano, being duly sworn do depose and say:

1. I am over the age of 18 years and understand the obligations of an oath.

2. I have personal knowledge of the facts contained in this affidavit.

3. I am the Chief Examiner for the City of New Haven; I am also the Secretary to the New Haven Civil Service Board.

4. I hold a Master of Science degree in Counseling-Human Resources Development, I am certified by the Society of Human Resource Management as

Senior Personnel Human Resources. I possess over fifteen years of experience in the career field of Human Resource Administration and have dealt directly with employment testing issues for the last ten years of my career.

5. I am familiar with the Uniform Guidelines on Employee Selection Procedures, specifically Section 4D: Adverse Impact and the "four-fifths rule." The guidelines are attached to the Defendants' Local Rule 56(a)1 Statement.

6. In the normal course of events with promotional tests of the type at issue in this litigation, as Chief Examiner I request initial information from the test consultant with respect to overall pass rates as well as results of the adverse impact analysis conducted on tested candidates. My inquiry to Industrial/Organizational Solutions with respect to this initial information on overall pass rates and the adverse impact analysis led to the delivery of the preliminary scoring data of candidates tested for Fire Lieutenant and Fire Captain.

7. I received and reviewed the preliminary scoring data from Industrial/Organizational Solutions for the promotional examinations for Fire Lieutenant and Fire Captain in late December 2003, and was concerned that there would be adverse impact in the selection rates of candidates for promotion.

8. Thereafter, I discussed this matter with my immediate supervisor, the Director of Human Resources.

9. I participated in several meetings with my director, the corporation counsel and other city officials at which this issue was reviewed and its ramifications discussed.

10. In the course of these discussions, it was decided that it was not appropriate to submit draft eligible lists to the Civil Service Board to be certified. It was concluded that the best course of action would be to submit all relevant information to the Civil Service Board and to let the Board decide on how to proceed with this matter.

11. The Civil Service Board decided to conduct public hearings that involved the issues concerning this suit. Evidence at the Civil Service hearings reinforced my concerns about the tests in regard to adverse impact.

12. There were five Civil Service Board proceedings concerning these issues held on various dates in the beginning of 2004; namely, a Civil Service Board meeting on January 22nd, and four public hearings conducted on February 5th, February 11th, March 11th, and March 18th.

13. All Civil Service Board meetings and public hearings at which these issues were discussed were publicly noticed. I also faxed a copy of each notice document directly to the offices of the New Haven Firefighters Local 825 ("Union"). Letters were also mailed to each candidate who tested in the subject exams informing them of the initial January meeting.

14. My initial concerns were based on the fact that under Section 4D: Adverse Impact and the "four-fifths rule" of the Uniform Guidelines on Employee Selection Procedures, the tests at issue in this litigation revealed considerable adverse impact.

15. Section 160 of the New Haven Charter governs New Haven's merit selection process, and it provides that only those applicants with the three highest scores on a promotional examination can be appointed; this provision is commonly referred to as the "Rule of Three". Section 160 also provides that only those applicants with a score of at least seventy percentum can be appointed; as such, 70% or higher is considered a passing score.

16. At the time the subject tests were administered there were seven vacancies for the captain position. Based on the Rule of Three, had the results of the subject test been certified, the applicants with the top nine scores on the captain examination would have been eligible for consideration for appointment to that position.

17. Based on the Rule of Three, and the number of promotional vacancies for which the results of said tests would determine selection, two Hispanic candidates could have been considered for appointment to captain and no African-American candidate could have been considered for appointment to captain.

18. At the time the subject tests were administered there was one vacancy for the position of lieutenant. However, if the subject test results were

certified, seven lieutenants would have been promoted to captain and that would have resulted in a total of eight vacancies at the lieutenant position. Based on the Rule of Three, had the subject results been certified, the applicants with the top ten scores on the lieutenant examination would have been eligible for consideration for appointment to that position.

19. Based on the Rule of Three, and the number of promotional vacancies for which the results of said tests would determine selection, no minorities would have been eligible for consideration for appointment to lieutenant.

20. I assisted with the preparation of a written summary comparing results from previous examinations with the preliminary results from these examinations, which summary was provided to the Civil Service Board at its January 22, 2005 meeting. At the January 22nd meeting, the Civil Service Board was also provided with a four page summary of relevant laws and regulations prepared by the City's corporation counsel and the preliminary scoring data for the subject examinations.

21. I believe that due to the adverse impact in the preliminary examination results, application of the Rule of Three would have resulted in disparate treatment of the minority candidates who competed in the subject tests.

22. The following is based on Section 160 of the New Haven Charter, which provides that 70% is the

passing grade for the subject examinations, and the Preliminary Scoring Data for 2003 Captain Exam:

a. Forty-one people took the promotional examination for the Captain positions.

b. Twenty-five Caucasian candidates took the promotional examination for the Captain positions.

c. Eight African American candidates took the promotional examination for the Captain positions.

d. Eight Hispanic candidates took the promotional examination for the Captain positions.

e. There were two portions of the promotional examination for the Captain positions, namely, a written portion and an oral portion.

f. Eighteen out of twenty-five Caucasian candidates passed the promotional examination for the Captain positions based on their composite scores.

g. Three out of eight African American candidates passed the promotional examination for the Captain positions based on their composite score.

h. Three out of eight Hispanic candidates passed the promotional examination for the Captain positions based on their composite score.

23. The following is based on Section 160 of the New Haven Charter, which provides that 70% is the

passing grade for the subject examinations, and the Preliminary Scoring Data for 2003 Lieutenant Exam:

a. Seventy-seven people took the promotional examination for the Lieutenant position.

b. Forty-three Caucasian candidates took the promotional examination for the Lieutenant position.

c. Nineteen African American candidates took the promotional examination for the Lieutenant position.

d. Fifteen Hispanic candidates took the promotional examination for the Lieutenant position.

e. There were two portions of the promotional examination for the Lieutenant position, namely, a written portion and an oral portion.

f. Twenty-six out of forty-three Caucasian candidates passed the promotional examination for the Lieutenant position based on their composite score.

g. Six out of nineteen African American candidates passed the promotional examination for the Lieutenant position based on their composite score.

h. Three out of fifteen Hispanic candidates passed the promotional examination for the Lieutenant position based on their composite score.

24. I believe that the certification of the results of these tests would have had significant discriminatory effects in the future since the candidates promoted as a result of these tests would be eligible to sit for future promotional exams and continue the advancement of their careers in the New Haven Department of Fire Services.

25. My decisions and actions regarding this issue were made in good faith, and were based solely on my concerns with compliance with Federal Civil Rights Law, the City Charter, and Civil Service Rules.

26. The Preamble of the New Haven Charter provides that "it is the public policy of the City of New Haven to ensure full and equitable participation of all citizens in all aspects of the life of the city without regard to race. . . ."

27. The paragraph entitled Discrimination-Prohibitions under Rule II of the Civil Service Rules prohibits racial discrimination.

28. Article XX, section 20.1 of the relevant collective bargaining agreement (namely, The Agreement Between City of New Haven and New Haven Fire Union, Local 825 International Association of Fire Fighters, AFL-CIO, dated July 1, 2002 – June 30, 2006) prohibits racial discrimination.

29. The Civil Service Board never certified an eligibility list from either of the subject examinations, and no one was promoted as a result of the subject examinations.

30. I am the only person who had access to information identifying candidates on the subject lists, and I never disclosed any candidate's score to anyone prior to the Civil Service Commission meeting in March 2004.

/s/ Neolia Marcano
Noelia Marcano

Subscribed and sworn to before me this 2nd day November, 2005.

/s/ [Illegible]
Commissioner of the
Superior Court
~~Notary Public~~
~~My Commission Expires:~~

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Nos. 07-1428, 08-328

Supreme Court, U.S.
FILED
FEB 19 2009
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In The
Supreme Court of the United States

FRANK RICCI, ET AL.,

Petitioners,

v.

JOHN DESTEFANO, KAREN DUBOIS-WALTON, THOMAS UDE, JR., TINA BURGETT, BOISE KIMBER, MALCOLM WEBER, ZELMA TIRADO, AND CITY OF NEW HAVEN,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONERS' BRIEF ON THE MERITS

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QUESTIONS PRESENTED

This case presents the question whether Title VII and the Equal Protection Clause allow a government employer to reject the results of a civil-service selection process because it does not like the racial distribution of the results. Specifically:

1. When a content-valid civil-service examination and race-neutral selection process yield unintended racially disproportionate results, do a municipality and its officials racially discriminate in violation of the Equal Protection Clause or Title VII when they reject the results and the successful candidates to achieve racial proportionality in candidates selected?

2. Does an employer violate 42 U.S.C. §2000e-2(*l*), which makes it unlawful for employers "to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race," when it rejects the results of such tests because of the race of the successful candidates?

PARTIES TO THE PROCEEDING

The additional petitioners are Michael Blatchley, Greg Boivin, Gary Carbone, Michael Christoforo, Ryan DiVito, Steven Durand, William Gambardella, Brian Jooss, Matthew Marcarelli, Thomas J. Michaels, Sean Patton, Christopher Parker, Edward Riordan, Timothy Scanlon, Benjamin Vargas, John Vendetto, and Mark Vendetto.

James Kottage and Kevin Roxbee were plaintiff-appellants below with respect to claims not relevant to this case. They have an interest in this proceeding only to the extent of their interest in those claims.

All respondents are listed in the caption. At all times relevant to this action, John DeStefano was Mayor of the City of New Haven, Karen Dubois-Walton was Chief Administrative Officer, Thomas Ude, Jr. was Corporation Counsel, Tina Burgett was Director of Personnel, and Boise Kimber was a member of the Board of Fire Commissioners. Respondents Malcolm Weber and Zelma Tirado were members of the city's Civil Service Board.

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OPINIONS BELOW

The district court's opinion, now reported at 554 F.Supp.2d 142, is reprinted at Pet.App. 5a-51a. The court of appeals's unpublished order is unofficially reported at 2008 WL 410436 and reprinted at Pet.App. 1a-4a. The *per curiam* opinion withdrawing the earlier order is reported at 530 F.3d 87 and reprinted at Supp.Pet.App. 1a-3a. The order denying rehearing en banc is reported at 530 F.3d 88 and reprinted at Supp.Pet.App. 4a-36a.

JURISDICTION

The district court had jurisdiction under 28 U.S.C. §§1331, 1343(a)(4). The court of appeals issued a judgment on February 15, 2008, subsequently withdrew the summary order on which that judgment was based, and entered a new judgment on June 9, 2008. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides in relevant part: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."

Pertinent provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2 *et seq.*, as amended, are lengthy and reprinted at Pet.App. 54a-58a.

INTRODUCTION

Our Constitution envisions a society in which race does not matter and individuals are judged on the strength of their character and the value of their achievements. Equal treatment and race neutrality are overarching principles deeply imbedded in the Equal Protection Clause. The Court has made clear that meaningful equality under the Equal Protection Clause and equal opportunity under Title VII are not achieved by discriminating against one group of individuals to benefit another group on account of race. Discrimination only begets more discrimination, and it deepens racial divides that are only bridged by implementing the equal treatment the Constitution and Title VII require. Thus, the Court strictly scrutinizes the use of racial considerations in public employment and contracting and has permitted it only as a rare remedy narrowly focused to correct actual intentional governmental discrimination.

Connecticut law and New Haven's charter implement a civil service system that promises fair and merits-based treatment for all. Petitioners sought to deepen their commitment to public service and to better their circumstances for themselves and their

families through extraordinary efforts to prepare for and succeed in that process. Their disappointment in being denied the promotions they earned because of the city's overtly race-based determinations is no different than that of other Americans who have been discriminated against on account of their race and found the courthouse doors open to them. Petitioners ask nothing more than the basic American right to be judged by who they are and what they have accomplished, not by the color of their skin.

STATEMENT OF THE CASE

In 2003, New Haven sought to fill command vacancies in its fire department. Petitioners qualified for promotion under a race-blind, merit-selection process mandated by local law but were denied the positions by the city because of their race and racial disparities in the examinations' outcome.[1] City officials refused to promote the successful candidates and left the vacancies unfilled, intending to repeat the competition with the aim of awarding a higher proportion of the promotions to minority candidates.

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[1] Petitioner Benjamin Vargas is Hispanic; the other qualifying petitioners are non-Hispanic whites. Although "Hispanic" denotes ethnicity and not race, petitioners use the term "race" generally to refer to both.

I. New Haven's Civil Service Laws and Regulations Require Merit Selection.

The city's charter establishes a competitive merit system requiring all entry-level and promotional vacancies in the classified civil service to be filled with the most knowledgeable and ablest individuals as determined by job-related examinations scored on a one-hundred-point scale. No examination question may relate to race nor may any candidate be denied promotion because of race. Pet.App. 74a-77a, 80a-82a, 85a-86a, 89a-113a. After each examination, the Civil Service Board must promulgate (or "certify")[2] a ranked eligibility list of applicants who score at least seventy percent. The "rule-of-three" requires the Board of Fire Commissioners to fill each vacancy from among the top three scorers on the list to curtail political patronage, prevent improper favoritism, and ensure selection of the most qualified candidates. The list is active for a maximum of two years from the date of its promulgation. Pet.App. 88a-90a, 104a-106a, 109a.

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[2] Corresponding civil service rules and regulations define "certify" to mean "[t]he process of supplying an appointing authority with the names of eligibles for appointment." Pet.App. 89a.

II. RESPONDENTS HAVE REPEATEDLY VIOLATED THE LAW TO AVOID MERIT SELECTION.

The Connecticut Supreme Court has consistently mandated strict compliance with civil service laws, citing the public need for the most able workforce free of favoritism, corruption, and the spoils system that these laws were designed to eradicate. See, *e.g.*, *Kelly* v. *City of New Haven*, 881 A.2d 978, 1000-1004 (Conn. 2005) (finding that New Haven's *post hoc* manipulation of promotion test scores to evade the rule-of-three violated the law and undermined the purpose of ensuring selection of the most qualified by limiting discretion and hence patronage, race discrimination, and corruption). The administration of New Haven's Mayor DeStefano has drawn multiple, stern rebukes from state judges for "blatant lawlessness," *Henry* v. *Civil Serv. Comm'n*, 2001 WL 862658, *1 (Conn. Super. July 3, 2001), in employing "charade[s]," *id.*, at *2, and "subterfuge[s]," *Kelly*, 881 A.2d, at 1003, to subvert the law and stood accused in multiple suits of repeatedly and intentionally discriminating against whites and manipulating exam results for political gain. See *Henry*, 2001 WL 862658, *1-*3; *Bombalicki* v. *Pastore*, 2001 WL 267617, *2-*3 (Conn. Super. Feb. 28, 2001), aff'd, 804 A.2d 856 (Conn. App. 2002); *Hurley* v. *City of New Haven*, 2006 WL 1609974, *1 (Conn. Super. May 23, 2006); see also Pet.App. 756a-761a, 935a-937a. In reaction, respondents unsuccessfully sought voter approval to eliminate the rule-of-three by charter amendment. *Kelly*, 881 A.2d, at 1001, n.41; see also CA2 J.A. 1683-1684; Pet.App. 756a-761a. Only after

suffering serial setbacks in the state courts and at the ballot box did respondents for the first time adopt the justification of "voluntary compliance" with federal law when they refused to grant the promotions earned through the 2003 examinations.

III. Respondents Strove to Ensure the 2003 Exams Were Job-Related and the Promotion Process Was Race-Neutral.

Respondents engaged Industrial/Organizational Solutions, Inc. (IOS), a professional testing firm with experience in public safety, to develop promotional examinations that would identify those with the knowledge, skills, and abilities (KSAs) needed to perform the command responsibilities of captains and lieutenants. Pet.App. 308a-328a. The NHFD is a multi-disciplined emergency-service agency in a port city with major transportation networks. Lieutenants and captains must have a sophisticated level of KSAs and must possess considerable scientific and tactical knowledge, leadership skills, and good judgment. Pet.App. 348a-352a, 361a-366a. Apart from fire science, they must be well versed in building and high-rise construction, structural collapse, tactical response protocols for fire and non-fire-related catastrophes, confined-space and high-angle rescue, use of sophisticated equipment, and other subjects. They report directly to a battalion chief and indirectly to the chief. They must be able to train, discipline, and lead first responders. At the direction of the state, the NHFD also responds to medical emergencies and

must provide pre-hospital medical care. *Ibid.*; see also Pltffs.' Exhs. 46, 47, R. Doc. #120.

The qualifying process included a written job-knowledge examination followed by a comprehensive structured oral assessment of applicants' skills and abilities to command others in emergencies. Pet.App. 1077a-1164a (containing the exams). The job-knowledge exam accounted for 60% and the oral assessment for 40% of the total score. Pet.App. 312a, 483a. The cutoff composite score was calibrated to equate with minimal competence. Pet.App. 330a-331a.

IOS composed and validated the exams based on EEOC-recommended practices. Pet.App. 316a-317a, 329a-335a.[3] Aware that New Haven, like other cities, routinely experiences racial disparities in outcomes of qualifying exams, IOS went to great lengths in collaboration with city officials to mitigate that impact to the greatest extent possible without compromising the integrity of the exams. It engaged in a painstaking process of job analyses, employing questionnaires, interviews, and ride-along exercises with incumbents to identify the importance and frequency of essential job tasks. There was a deliberate overrepresentation of minority incumbents in this process. Pet.App. 150a-154a, 262a-264a, 337a-343a, 597a-650a.

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[3] See 29 C.F.R. §§1607.5, 1607.14, 1607.16 (providing that content-validity is established by thorough job analyses and identification of essential KSAs).

IOS identified professional texts and other source material in collaboration with NHFD Chief Grant and Assistant Chief Dumas, who is black. Pet.App. 625a-627a, 817a-818a, 847a-848a. The written tests went through several drafts and were pared down to 100 questions after painstaking analysis and cross-checking of each item against source material. Pet.App. 309a-310a, 623a. The city went beyond the norm by allowing a three-month study period and providing highly particularized syllabi that allowed candidates to focus on specific chapters of each text from which test questions were drawn. Pet.App. 346a-374a, 799a-800a. Promotional examinations are infrequent opportunities for career advancement, and petitioners bore significant expense and personal sacrifice during the three-month study period.[4]

To mitigate any potential adverse impact, exams were written below a tenth-grade reading level. Further aiming to stem adverse impact, all candidates could proceed to the oral assessment phase irrespective of their performance in the job-knowledge examination. Pet.App. 160a-161a, 267a-268a, 338a, 666a.

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[4] For example, Frank Ricci, to overcome dyslexia, paid to convert study texts to audio recordings; Gregory Boivin resigned from part-time jobs; Benjamin Vargas and his wife both took leave from their second and primary jobs; and Christopher Parker studied in his wife's hospital room as they awaited the delivery of their son. Pet.App. 375a-378a, 392a-398a, 402a-409a, 413a-419a.

Unlike the written exam, which measures job knowledge, the oral phase is designed to test skills and abilities (though some measure of parity is expected). Pet.App. 667a, 708a-709a. City officials and IOS went to similar extraordinary lengths to devise a content-valid, comprehensive, structured oral assessment process for candidates to be rated by panels of fire-service professionals. Seeking the most knowledgeable assessors, IOS searched nationwide and consulted minority organizations for officers in the rank of captain or above. It assembled a pool of thirty assessors that included battalion chiefs, assistant chiefs, and chiefs, in which minorities were overrepresented—all nine active three-member panels included only one nonminority member (even though most candidates were white). Pet.App. 162a-165a, 268a-270a, 344a-345a, 654a-661a.

Panelists reviewed keyed responses and performed mock rehearsals and exercises designed to calibrate ratings. They were trained to engage in consensus rating, a measure designed to ensure consistency and prevent one assessor from skewing results by atypical scoring. Candidates were allowed to organize their thoughts on paper before articulating responses to various incident scenarios and were measured for their tactical knowledge and skills, leadership ability, and sound judgment in life-and-death situations. The process was monitored by IOS experts, and post-assessment review showed the panel ratings were sound, consistent, and indicative of a high level of reliability. Pet.App. 164a-168a,

269a-271a, 656a-657a, 661a-663a. Ninety applicants took the lieutenant's written exam, of whom seventy-seven chose to proceed to the oral assessment. Pet.App. 168a, 271a, 428a-432a. Forty-one applicants took the captain's exam. Pet.App. 433a-436a. Review of candidate feedback questionnaires showed that, overall, candidates believed the examinations were fair and job-related. Pet.App. 338a, 651a-652a. The exams fairly and validly tested candidates' relative levels of KSAs. Pet.App. 179a, 197a-199a, 277a, 289a, 329a-339a, 603a-606a, 633a-634a, 1023a-1025a.

IV. After Learning the Race of Candidates Who Would Have Been Immediately Promoted, Respondents Scuttled the Promotions.

Candidates were race-coded. The scoring results revealed racial disparities in pass rates and levels of KSAs for those who did pass that were similar to adverse impact ratios seen in previous exams. Pet.App. 423a-427a, 950a-957a. Candidates of all races passed both exams and were eligible for promotion. Pet.App. 428a-436a. Most of the petitioners were among the top scorers and eligible for immediate promotion. Pet.App. 24a-25a, 390a, 437a-438a. Because of the small number of immediate vacancies, however, applying the rule-of-three meant, according to respondents, that no African-Americans could be immediately promoted and the new lieutenants "w[ould] all be white," though two Hispanics would be among the eight new Captains. Pet.App. 439a-445a, 475a-476a.

Respondents conceded that additional lieutenant vacancies arose that would have allowed three African-Americans to be promoted. Pet.App. 235a-236a, 305a-306a.

Respondent Kimber, a local political activist and valuable vote-getter for Mayor DeStefano who was a member and former chairman of the Board of Fire Commissioners, contacted the mayor's office to try to prevent petitioners' promotions. Pet.App. 812a-816a, 882a-883a. From early on, respondents agreed to adopt an air of neutrality while privately collaborating to push the board to scuttle the promotions. *E.g.*, Pet.App. 446a-459a, 832a.

Respondents' initial effort to impugn the validity of the examinations failed when IOS refused to concede nonexistent flaws in the tests. According to IOS representative Chad Legel, in a meeting to discuss the test results, respondents ignored his assurances of validity and focused instead on the "racial" and "political" overtones of the situation. Pet.App. 333a-334a. Industry-standard protocol and IOS's contract called for a technical report that would elaborate on the exams' content-validity and scoring methodology and establish the city's lawful use of test results for selection notwithstanding any adverse impact. Pet.App. 330a-331a. Respondents had previously accepted such reports and proceeded with selections. See Pet.App. 958a-1011a (sample of previously accepted technical report). IOS stood ready to issue the report, but respondents did not wish to receive it. Pet.App. 331a-334a.

The ministerial promulgation of the eligibility lists by the board was interrupted by a letter from city counsel Ude raising the specter of a Title VII violation and respondents' unprecedentedly providing to the board race-coded, but name-redacted, eligibility lists. Pet.App. 428a-436a, 439a-445a. Petitioners introduced evidence showing that the name-redacted lists were designed to thwart any judicial challenge to the city's intended action. Pet.App. 232a-235a, 305a, 783a-784a. Despite IOS's explicit request, respondent Burgett, the city's personnel director, declined to share with the board either IOS's letter noting its confidence in the exams' validity or respondents' decision to abort delivery of the technical report. Pet.App. 190a-191a, 287a, 329a-339a.

The board met four times. Attempting to establish the availability of equally valid alternative tests with less adverse impact, respondents solicited three professionals to offer opinions, among them Christopher Hornick, an IOS competitor, who spoke briefly to the board by telephone. Hornick commented that there was "significant adverse impact" from the written exams, but that it was "fairly typical" and "generally in the range of what we've seen professionally." Pet.App. 548a-549a. He asserted generally, without having even studied the exams, that he had developed tests with less disparate impact,[5] but he

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[5] Hornick did not specify whether he was referring to promotional exams or entry-level aptitude tests. Pet.App. 548a.

emphasized that he was "not suggesting that I/O Solutions somehow created a test that had adverse impacts that it should not have had." Pet.App. 549a, 553a, 556a. He referred to an "assessment center" testing method but offered no details or disparate-impact analysis of the method. Pet.App. 557a. Hornick concluded by noting that, although the exam results showed adverse impact, the city should proceed with the promotions, Pet.App. 558a, and offered his services for future tests, Pet.App. 562a-563a.

Janet Helms, a professor of race and culture with no expertise in public safety, neither examined the tests or their development and validation; nor did she consult with IOS, relying instead solely on demographic statistics and newspaper articles. Pet.App. 571a, 573a. Helms characterized the tests' disparate impact as "not that inconsistent with what predictions would say" and added that she could predict disparate impact on any written test before it was given. Pet.App. 570a, 573a.

The third consultant, and the only one to actually study the exams, was Vincent Lewis, a highly credentialed expert in fire and homeland security services. Lewis, who is African-American, thought well of the exams and believed they measured the KSAs that commanders must possess. Pet.App. 461a-464a, 563a-569a, 828a.

At the board's final meeting, respondents Ude, Dubois-Walton (speaking for the mayor), and Burgett urged abandoning the lists in favor of unspecified

potential alternatives, citing Hornick's remarks and dismissing Lewis's. Leaders of the city board of aldermen's black caucus urged the board to reject the lists for the sake of diversity and civil-rights requirements. Pet.App. 458a-459a, 575a-582a. Not allowed to speak were Chief Grant and Assistant Chief Dumas, although they were involved in the exam development process. Both believed the exams were fair and valid and the results should have been respected. Pet.App. 228a-229a, 817a-818a, 845a-852a. Although respondents denied any improper motive in excluding the views of the NHFD's top two officials, Kimber was allowed to disrupt the board's proceedings, object to the promotions, and threaten board members with political reprisals. Pet.App. 490a-498a, 780a-781a, 857a-858a. The board deadlocked and the promotions were scuttled.[6] Pet.App. 586a-589a. Just in case, the mayor, on Ude's advice, was prepared to override a board vote to certify with an executive order prohibiting the Board of Fire Commissioners from awarding promotions.[7] Pet.App. 590a-591a, 819a-820a.

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[6] Only four members voted; respondents Weber and Tirado voted against certification. Pet.App. 586a-588a. The nonvoting fifth member was the sister of one of the unsuccessful minority candidates. Pet.App. 829a-831a.

[7] Under the city charter, New Haven's mayor has no vote on the civil service board. Pet.App. 72a.

V. PROCEEDINGS BELOW

Petitioners sued under 42 U.S.C. §1983 alleging respondents' actions violated the Equal Protection Clause and filed timely charges of discrimination with the EEOC. Upon the EEOC's issuance of right-to-sue letters, petitioners amended their complaint to assert violations of 42 U.S.C. §2000e-2 *et seq*. After discovery closed, the parties cross-moved for summary judgment on the equal protection and Title VII claims.

Respondents conceded that they were not relying on an affirmative action plan, were not acting to remedy prior discrimination, and were not attempting to achieve racial diversity in the command ranks. Pet.App. 938a-945a, 1013a-1037a. Their rejection of petitioners, they insisted, stemmed solely from their "good faith" belief that promoting them would violate Title VII's disparate-impact provision. *Ibid*. The city's chief civil service examiner conceded she could discern no flaws in the written examinations or any basis to question the fairness of the oral assessors' ratings. CA2 J.A. 1243-1244, 1259-1260, 1268.

Dubois-Walton confirmed that respondents were not asserting that the exams were invalid. All she understood from Hornick was that a possible exam alternative, the so-called "assessment center" approach, might exist that "may have" less adverse impact. Pet.App. 827a, 848a, 853a-856a. Respondents cited Hornick's out-of-court statements to the board

as evidence of their "good faith" belief that alternatives might be available.[8] Petitioners countered with evidence of Hornick's own publications which directly contradict his hearsay comments regarding the assessment center approach.[9] Pet.App. 390a, 592a.

The district court granted summary judgment for respondents on petitioners' Title VII and equal protection claims. Despite the absence of any equally valid alternatives with demonstrably less racially adverse impact, the district court dismissed petitioners' Title VII claim by stating that "it is not the case that defendants *must* certify a test where they cannot pinpoint its deficiency explaining its disparate impact under the four-fifths rule simply because they have not yet formulated a better selection method."[10]

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[8] Respondents also proffered other out-of-court statements, including unsubstantiated assertions about civil service practices in Bridgeport, Connecticut, from the leaders of an outside minority firefighter group. CA2 J.A. 827-844. When challenged, respondents conceded that all of the out-of-court statements to the Board were inadmissible to establish the availability of alternatives and proffered them instead for the limited purpose of establishing a purported state-of-mind defense. Pet.App. 1024a-1025a.

[9] Legel explained that, unlike a written examination, an assessment center is not "geared toward measuring job knowledge" and generally cannot assess a candidate's command of technical information. Pet.App. 707a-713a. He emphasized that "the assessment center is not a substitute for a written exam." Pet.App. 718a.

[10] EEOC guidelines advise that a "selection rate for any race, sex, or ethnic group which is less than four-fifths . . . of the

(Continued on following page)

Pet.App. 34a. The court resolved the contested issue of respondents' motivation as a matter of law, Pet.App. 47a, and elsewhere observed the tests' "undesirable outcome" could "subject the City to Title VII litigation by minorit[ies] and the city's leadership to political consequences." Pet.App. 24a. Addressing petitioners' assertion that respondents' professed fidelity to Title VII was a pretext for intentional race discrimination against them to provide political patronage benefits for minority allies of respondent Kimber, the court concluded that even if "political favoritism or motivations" were "intertwined with [respondents'] race concern," that would "not suffice" even to get petitioners past summary judgment. Pet.App. 43a. In dismissing petitioners' equal protection claims, the court reasoned that since no one was promoted, and all candidates were "treated the same," respondents' action was race-neutral and strict scrutiny did not apply. Pet.App. 45a-46a.

By a brief one-paragraph summary order, the court of appeals affirmed the judgment, concluding that "the [Board] found itself in the unfortunate position of having no good alternatives. . . . [B]ecause the Board, in refusing to validate the exams, was simply trying to fulfill its obligations under Title VII when confronted with test results that had a disproportionate racial impact, its actions were protected." Pet.App. 3a-4a.

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rate for the group with the highest rate will generally be regarded . . . as evidence of adverse impact." 29 C.F.R. §1607.4(D).

Subsequently, a judge of the court of appeals *sua sponte* requested a poll on rehearing en banc. On June 9, 2008, after the poll was concluded but before its result had been announced, the panel withdrew its summary order and simultaneously issued a *per curiam* opinion essentially duplicating the summary order. See Supp.Pet.App. 1a-5a. Three days later, the Second Circuit announced it had voted 7-6 to deny rehearing en banc, with Judges Parker and Calabresi concurring in the denial of rehearing. Supp.Pet.App. 4a-11a, 30a-33a. Judge Cabranes, for all six dissenting judges, questioned the panel's evident conclusion that "any race-based employment decision undertaken to avoid a threatened or perceived Title VII lawsuit is immune from scrutiny under Title VII" and its failure to address the constitutional issues at the core of the case. Supp.Pet.App. 11a-30a.

SUMMARY OF THE ARGUMENT

The City of New Haven's refusal to promote the plaintiff firefighters because of their race violated the Equal Protection Clause. The Equal Protection Clause is fundamentally skeptical of race-based government action; accordingly, the Court has consistently subjected such action to strict scrutiny, invalidating it in all but the rarest of circumstances. See, *e.g.*, *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200, 224 (1995). The city's refusal to promote petitioners was a race-based government action grounded solely on the racial distribution of the test results. The

entire cluster of reasons respondents offered for scrapping the promotions are related to and depended on petitioners' race and therefore, should be strictly scrutinized.

Respondents' action fails strict scrutiny. The city did not offer a compelling interest to justify its race-based action. It did not claim it was attempting to remedy past official discrimination, and its stated fear of Title VII litigation or liability based merely on unintentional numerical disparity cannot supply the requisite compelling interest, particularly when respondents had no reason to think that the test inflicted any impermissible discrimination. The purported interest of seeking to provide role models for minorities, which the district court wrongly attributed to respondents, has already been rejected by this Court as uncompelling. *Wygant* v. *Jackson Board of Educ.*, 476 U.S. 267, 276 (1986) (plurality opinion). Similarly, respondents disclaimed an interest in diversity and, in any event, diversity has never been (and should not now be) accepted by this Court as a compelling interest in the government-employment context. Respondents' putative interest in avoiding political criticism could never be a compelling reason to racially discriminate. Finally, the remedy selected by the city—cancelling the promotions across the board—was not narrowly tailored to achieve any compelling interest.

Allowing respondents to cancel these promotions after the administration of a fair and job-related test

designed to identify meritorious promotion candidates, simply because of the successful candidates' race and respondents' associated racial concerns, would allow overt racial balancing, de facto quotas, and blunt race politics in government hiring, all consequences the Court has sternly condemned in other contexts.

The city's refusal to promote petitioners also violated Title VII. Petitioners' claim of disparate treatment motivated by their race has gone essentially unrebutted, and Title VII cannot permit the city's intentionally discriminatory actions to be excused by unsupported claims about possible disparate-impact liability or nebulous claims of "voluntary compliance" that are effectively indistinguishable from the imposition of racial quotas. Mere numerical evidence of disparate impact cannot be enough, especially when respondents knew their tests were content-valid. And mere conjecture about the possible existence of alternative tests that might have less disparate impact is far too slender a reed to support government's resort to race-based deprivations. In addition, respondents' bold rejection of test results on the basis of race is independently prohibited by the 1991 amendment to Title VII forbidding race-based tampering with employment test results.

ARGUMENT

I. RESPONDENTS' REFUSAL TO PROMOTE PETITIONERS VIOLATED THE EQUAL PROTECTION CLAUSE.

A. The Equal Protection Clause Disfavors Race-Based Government Actions and Subjects Them to Strict Scrutiny.

The Equal Protection Clause disfavors race-based government action, requires that it be strictly scrutinized, and results in it being invalidated in all but the rarest of circumstances. See, *e.g.*, *Parents Involved in Cmty. Schs.* v. *Seattle Sch. Dist. No. 1*, 127 S.Ct. 2738, 2751-2752 (2007). Because racial classifications are inherently pernicious, and because equal treatment irrespective of race is the absolute core of the guarantee of the Equal Protection Clause, the Court has consistently viewed race-based governmental action with skepticism and hostility. See *Washington* v. *Davis*, 426 U.S. 229, 239 (1976) ("The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race."); *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 518 (1989) (Kennedy, J., concurring in part and concurring in the judgment) ("The moral imperative of racial neutrality is the driving force of the Equal Protection Clause.").

To implement the Constitution's deep aversion to racial distinctions, the Court has made clear that all race-based government actions are subject to strict

scrutiny, requiring the government to demonstrate that race-based action is narrowly tailored to achieve a compelling governmental interest. *Adarand*, 515 U.S., at 227. In practice, the Court has found few governmental interests compelling enough to justify disparate racial treatment and even fewer government actions to actually be narrowly tailored to achieve a compelling interest. Strict scrutiny applies fully to race-based actions taken out of a professed desire to advantage or remedy past harms to minorities; "the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification." *Croson*, 488 U.S., at 494 (plurality opinion); accord *Adarand*, 515 U.S., at 223-224. Merely expressing an intent to benefit minorities, as opposed to an animus towards whites, does not insulate such policies from scrutiny. *Adarand*, 515 U.S., at 226; see *Md. Troopers Assn., Inc.* v. *Evans*, 993 F.2d 1072, 1076 (CA4 1993) ("All too easily, invidious racial preferences can wear the mask of remedial measures . . . . Courts thus bear an especial obligation to scrutinize the asserted bases for race-conscious relief." (citations omitted)).

The Court has recognized that a government actor's desire to remedy its own past intentional discrimination can justify remedial resort to racial classifications in employment or contracting but has required that it first have "a strong basis in evidence for its conclusion that remedial action was necessary." *Croson*, 488 U.S., at 500 (quoting *Wygant*, 476 U.S., at 277). The Court has never in the context of

government employment or contracting extended the scope of interests that can justify race-based action beyond past intentional governmental discrimination.

B. Respondents' Refusal to Promote Petitioners Was a Race-Based Government Action Subject to Strict Scrutiny.

Respondents' refusal to promote petitioners was a race-based action subject to strict scrutiny. All of the reasons given by respondents in rejecting petitioners' promotions were fundamentally grounded on the race of the successful candidates—whether characterized as the racial balancing that it was, or euphemistically as concerns about Title VII compliance, fears of political reprisals from powerful minority interests, or interests in promoting diversity and role models. Using race-coded lists to determine whether to certify, the city and its officials acted on raw racial labels and distributions. The cancellation of the promotions was specifically intended to—and did—prevent petitioners from being promoted because of their race.

"[W]henever the government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection." *Adarand*, 515 U.S., at 229-230. Petitioners were treated unequally because of their race: they were refused promotions only because they were white. The promotions were due under the city's charter and civil-service rules. Pet.App. 74a-86a, 99a-113a. Every reason advanced to justify abandoning

the promotions related to the fact that too many of the successful candidates were white. Because race-related reasons were the only reasons respondents offered, it is unquestionable race was the "predominant factor" in their refusal to promote petitioners. *Bush* v. *Vera*, 517 U.S. 952, 959 (1996) (plurality opinion). Respondents' decision, motivated by race, relying solely on racial-distribution information about the candidates, and with a starkly disparate racial harm, was not in any sense race-neutral.

Moreover, respondents' actions were consistent with a well-documented history of its repeated attempts to circumvent Connecticut civil-service protections. See *Kelly*, 881 A.2d, at 1000-1004; *Hurley*, 2006 WL 1609974, *1; *Henry*, 2001 WL 862658, *1-*3; *Bombalicki*, 2001 WL 267617, *2-*3 (detailing and criticizing the DeStefano administration's repeated attempts to circumvent Connecticut civil-service rules). This history is further evidence that the city's cancellation of the promotions was overtly a race-based action subject to strict scrutiny. See *Vill. of Arlington Heights* v. *Metro. Hous. Development Corp.*, 429 U.S. 252, 267 (1977) ("The historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes.").

Moreover, even if the decision could be considered race-neutral in some nominal sense, that still would not insulate it from strict scrutiny. "A facially neutral law . . . warrants strict scrutiny . . . if it can be proved that the law was 'motivated by a racial purpose or

object.'" *Hunt* v. *Cromartie*, 526 U.S. 541, 546 (1999) (quoting *Miller* v. *Johnson*, 515 U.S. 900, 913 (1995)). This rule applies fully in the employment context. *Pers. Adm'r of Mass.* v. *Feeney*, 442 U.S. 256, 272 (1979) (stating that the rule that racial classifications are presumptively invalid also applies "to a classification that is ostensibly neutral but is a . . . pretext for racial discrimination"). Respondents' decision to cancel the promotions across the board was, at the very least, a pretext for their desire, clearly expressed in their deliberations, not to promote white firefighters precisely because they were white (or because they were not black, which is for constitutional purposes the same thing). That is a racial classification subject to strict scrutiny. See *Majeske* v. *City of Chicago*, 218 F.3d 816, 818-819 (CA7 2000) (government action taken out of fear of potential disparate-impact liability was influenced by race and thus subject to strict scrutiny).

Nor do the district court's reasons for refusing to apply strict scrutiny bear inspection. It makes no sense to conclude that petitioners were not disadvantaged on account of their race because promotions were denied to everyone who took the test. That contradicts a number of this Court's cases, including *Croson*, in which the racial classification the Court strictly scrutinized was implemented through an across-the-board cancellation of bids that was motivated by a city minority-subcontracting set-aside. *Croson*, 488 U.S., at 483. Petitioners were denied merit-earned promotion, and thus were treated differently than unsuccessful candidates who had not earned

promotion, solely because of their race. Respondents' race-coded lists revealed that those immediately impacted would all be white, with the exception of two Hispanics.[11] Pet.App. 428a-436a, 475a-476a. Denying promotion across the board because the city wanted to promote more minorities is the functional equivalent of a race-balancing quota subject to strict scrutiny. City officials acted specifically because of petitioners' race, not in spite of it. See, *e.g.*, *Williams* v. *Consol. City of Jacksonville*, 341 F.3d 1261, 1269 (CA11 2003).[12]

The district court was also wrong in concluding that respondents' actions were not subject to strict scrutiny without evidence "that defendants acted 'because of' animus against non-minority firefighters." Pet.App. 47a. Animus is not necessary to show intentional discrimination, as is evident from the Court's many precedents overturning governmental racial discrimination that was based, not on animus towards whites, but on a stated benign intent to aid minorities. *E.g.*, *Adarand*, 515 U.S., at 226 ("More than good motives should be required when government

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[11] When the decision was made, respondents said no African-Americans would be eligible for promotion. The fortuity that slots later opened that would allow three African-Americans to be promoted, see Pet.App. 235a-236a, 305a-306a, does not change respondents' motivation at the time they made their decision.

[12] The district court's conclusion on this point is also fundamentally contradicted by its acceptance that petitioners had established a *prima facie* case under *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973). See Pet.App. 25a.

seeks to allocate its resources by way of an explicit racial classification system." (quotation, alteration omitted)).[13]

C. Respondents' Race-Based Refusal to Promote Petitioners Fails Strict Scrutiny.

Respondents offered no compelling interest that could justify their race-based cancellation of petitioners' promotions. Respondents expressly disclaimed remedying past discrimination or achieving diversity, and, in any event, none of the potential interests confected by the district court is a compelling interest:

> "[T]hat the test had a statistically adverse impact on African-American and Hispanic examinees; that promoting off of this list would undermine their goal of diversity in the Fire Department and would fail to develop managerial role models for aspiring firefighters; that it would subject the City to public criticism; and that it would likely subject the City to Title VII lawsuits from minority applicants that, for political reasons, the City did not want to defend." Pet.App. 47a.

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[13] If evidence of animus were required, petitioners presented it, including evidence of Kimber's racially charged appeals to the board and previous denigration of Italian-American firefighters in the NHFD. Pet.App. 490a-498a; CA2 J.A. 556-559.

1. Unsubstantiated Fear of Title VII Disparate-Impact Suits Cannot Be a Compelling State Interest.

Avoiding disparate-impact claims under Title VII cannot be a compelling interest justifying racial discrimination because the Equal Protection Clause does not allow government actors to engage in intentional racial discrimination to avoid potential claims of unintentional racial discrimination. Even if there ever could be such a compelling interest, it could exist only if the government had strong evidence that unintentional discrimination had in fact occurred and not when, as in this case, there was little more than numerical disparity and indeed strong indications that the tests and their results would have survived any Title VII challenge.

The Court has never recognized a compelling governmental interest in avoiding unintentional racial disparities. Instead, the Court has only recognized a compelling state interest in remedying past intentional discrimination by the state. See, *e.g.*, *Croson*, 488 U.S., at 507. This limitation makes simple sense—given the deep perniciousness of intentional governmental racial classifications, they should not be allowed to redress unintentional governmental discrimination or ambient societal discrimination. *Wygant*, 476 U.S., at 276 (plurality opinion).

Respondents admitted they did not act to remedy past intentional discrimination against minorities. Pet.App. 938a-945a, 1013a-1037a. Indeed, New Haven and its officials have a documented history of violating Connecticut law to give minorities advantageous treatment in public employment. See *supra* at 5-6. The recognized compelling remedial interest is not at stake in this case. See *Freeman* v. *Pitts*, 503 U.S. 467, 494 (1992); *Croson*, 488 U.S., at 492-493 (plurality opinion).

Instead, respondents asserted that their interest was in complying with Title VII by avoiding the prospect of lawsuits claiming disparate-impact discrimination. But avoiding Title VII disparate-impact claims cannot justify intentional race-based disparate treatment. See *People Who Care* v. *Rockford Board of Educ., Sch. Dist. No. 205*, 111 F.3d 528, 535 (CA7 1997). The Court has already made clear that the Equal Protection Clause forbids only intentional racial discrimination in governmental employment, not mere disparate impacts. *Davis*, 426 U.S., at 242. If avoiding mere numerical disparity becomes a compelling governmental interest to justify racial discrimination, then racial balancing will practically be compelled for any rational government employer. Governments, faced with potential (even if speculative) Title VII liability on the one hand, and complete immunity on the other—so long as they baldly assert a "good faith" belief they fear such liability, will have every incentive to take race-based action to avoid any racially disparate effects in public employment. In

short, "as a practical matter, *Washington* v. *Davis* would be undone," *Biondo* v. *City of Chicago*, 382 F.3d 680, 684 (CA7 2004), opening the door to the racial balancing that the Court has consistently condemned. See, *e.g.*, *Parents Involved*, 127 S.Ct., at 2758 (plurality opinion) ("racial balancing is not permitted"); *Grutter* v. *Bollinger*, 539 U.S. 306, 330 (2003) (attempt to achieve racial balancing would be "patently unconstitutional"); *Freeman*, 503 U.S., at 494 ("Racial balance is not to be achieved for its own sake."); *Croson*, 488 U.S., at 507.

The Constitution especially cannot permit governments to use claimed fears of disparate-impact liability as cover for what may actually be crude racial politics in action—a noxious and divisive practice this Court has roundly condemned in other circumstances. See, *e.g.*, *Parents Involved*, 127 S.Ct., at 2767 (plurality opinion) ("Government action dividing us by race is inherently suspect because such classifications promote notions of racial inferiority and lead to a politics of racial hostility." (quotation omitted)). If employers can reject the results of merit-promotion processes based on nothing more than a stated, unfounded, "good faith" fear of Title VII suits, or indeed a mere political indisposition to defend against them, the temptation to surrender to organized racial lobbies will be irresistible.

This case provides a striking illustration. In the thick of the city's decisionmaking when it cancelled the promotions was a well-connected local African-American politician. From the start, Kimber and his

friends in city government set out to thwart the promotions for reasons relating to racial politics. Pet.App. 812a-816a, 882a-883a. The mayor's inner circle even expressly discussed among themselves the need to make the process *appear* neutral and deliberative to cover their racial motivations. Pet.App. 449a, 459a. Kimber threatened board members with political reprisals if they allowed the promotions to go forward. Pet.App. 490a-498a. Intimidated, they voted the promotions down.

This Court has said strict scrutiny is designed to smoke out racial politics masquerading as remedial action. *Croson*, 488 U.S., at 493 (plurality opinion). So, too, must it smoke out racial politics masquerading as voluntary compliance with Title VII. The alternative would be the infiltration of public-employment decisionmaking by organized racial factions, and the accompanying emboldenment and strengthening of such factions resulting in their assumption of an increasingly larger and more divisive role in politics, especially at the local level. *Id.*, at 523 (Scalia, J., concurring in the judgment) ("[R]acial discrimination against any group finds a more ready expression at the state and local than at the federal level.").

A mere-good-faith rule would also contravene the Court's condemnation of the use of quotas or set-asides without a showing of past intentional racial discrimination by the government. See, *e.g.*, *id.*, at 499, 507. Government employers will be allowed (indeed, nearly compelled) to impose de facto quotas by simply rolling the dice over and over again until

the desired racial distribution turns up, cancelling promotions for whites whenever the racial distribution is unbalanced and permitting them whenever there are enough minorities to meet the racial goal. See *Lutheran Church-Mo. Synod* v. *FCC*, 154 F.3d 487, 494 (CADC 1998); see also *Wygant*, 476 U.S., at 295 (White, J., concurring in the judgment) ("I cannot believe that in order to integrate a work force, it would be permissible to discharge whites and hire blacks until the latter comprised a suitable percentage of the work force."). Public employers will be freed and practically forced to use the EEOC's four-fifths guideline as a soft quota in hiring and promotion. *Biondo*, 382 F.3d, at 684 ("If avoiding disparate impact were a compelling governmental interest, then racial quotas in public employment would be the norm . . . . ").

It would also contradict the clearly expressed intent of Congress:

> "Preferential treatment and the use of quotas by public employers subject to Title VII can violate the Constitution, and it has long been recognized that legal rules leaving any class of employers with little choice but to adopt such measures would be far from the intent of Title VII. . . . Allowing the evolution of disparate impact analysis to lead to this result would be contrary to Congress' clearly expressed intent . . . ." *Watson* v. *Fort Worth Bank & Trust*, 487 U.S. 977, at 993 (1988) (plurality opinion) (quotations, citations omitted).

Thus, avoiding disparate-impact liability can never be a compelling state interest that could justify intentional racial discrimination.

If it ever could, however, it could only be allowed on evidence of a statutory violation far more robust than respondents amassed here. To guard against fear of disparate-impact liability becoming a backdoor to public employers' imposition of unconstitutional quotas, the Court has emphasized that "the evidentiary standards that apply in these [disparate-impact] cases should serve as adequate safeguards against the danger that Congress recognized." *Ibid.* These applicable "evidentiary standards" do not stop at mere evidence of numerical disparity. They require a private plaintiff to prove either: (1) that an employer's selection criteria has a racially disparate impact and is not job-related (*i.e.*, not consistent with business necessity); or (2) the availability of an equally valid alternative with less disparate impact that the employer refused to adopt. See *infra* Part II. Surely a governmental employer bears at least the same burden as a putative disparate-impact plaintiff, in whose shoes the employer seeks to stand. Indeed because the governmental employer both controls the development of the selection device and the evaluation of any alternatives in the first place, courts should be especially vigilant in scrutinizing governmental actions that conveniently relinquish the government's own available defenses in a quest to achieve a different racial balance. See *Ho ex rel. Ho* v. *San Francisco Unified Sch. Dist.*, 147 F.3d 854, 865

(CA9 1998) (whether remaining vestiges of segregation justified district's race-conscious policies, as district asserted, was peculiarly within district's knowledge and control, thus requiring evidence more concrete than mere conclusory statements).

This requirement is confirmed by the Court's cases finding a compelling government interest in remedying past intentional governmental racial discrimination. Because the Equal Protection Clause is based on a fundamental suspicion of race-based government actions, even government actors wishing to take race-based action to remedy past *intentional* governmental discrimination must provide "a strong basis in evidence" to prove that the claimed interest actually is present. *Croson*, 488 U.S., at 500. *A fortiori*, if avoiding potential disparate-impact liability could ever be a compelling governmental interest, there absolutely must be a strong evidentiary foundation to show that the asserted compelling interest is present.

Thus, at a minimum, a government actor must have a strong evidentiary basis to conclude that an examination disproportionately excludes minorities and that it was either not job-related or that there were equally valid alternatives with demonstrably less adverse impact available. The Court should emphatically reject a rule that would allow government actors like respondents to justify race-based decisionmaking with the mere articulation of an interest in voluntary compliance with Title VII, without strong evidence of actual liability. Cf. *Shaw* v.

Hunt, 517 U.S. 899, 908, n.4 (1996) (requiring a strong basis in evidence of an actual violation of the Voting Rights Act to justify race-conscious remedial action, and denying any compelling interest "in avoiding meritless lawsuits"). The district court's standard essentially authorizes outright race balancing, which the Court rightly has never been willing to allow.

The city had almost no reason beyond mere numerical disparity to believe its tests were discriminatory. At considerable public expense, the city employed tests that were professionally developed to minimize adverse impact as much as possible through a painstaking process involving the city's personnel director, chief civil service examiner, and top NHFD officials. There can be no dispute that these exams actually served their purpose of screening out the unqualified and identifying the most qualified. Pet.App. 340a-343a, 597a-650a. City officials not only reacted to IOS's oral assurance of validity with disappointment but avoided receiving a written validity report. They ignored not only the views of IOS, but also those of the NHFD's Chief and Assistant Chief (who is black), both of whom thought the exams were fair and valid. Pet.App. 331a-334a, 845a-852a. But attempts to remain willfully ignorant of a test's validity do not establish a compelling interest in avoiding discrimination that violates Title VII.

Similarly, respondents also failed in their attempt to suggest the presence of alternatives that could justify their actions. Respondents had no solid

evidence that there were equally valid alternatives to the tests they had given that would have had less adverse impact. Pet.App. 545a-574a, 1030a-1031a. Even the district court recognized the "shortcomings" in the evidence of alternatives. Pet.App. 37a.

In short, respondents had no reason to believe that the test actually had violated Title VII.[14] See also *infra* Part II. That cannot constitute a compelling interest justifying the race-based refusal to promote petitioners.

2. Attempting to Develop Role Models Is Not a Compelling Interest.

This Court has rejected an interest in developing minority role models as sufficiently compelling to justify race-based action in government employment. *Wygant*, 476 U.S., at 276 (plurality opinion) (rejecting role-model interest); accord *Croson*, 488 U.S., at 498 (plurality opinion) (confirming *Wygant*'s rejection). The Court's reasons—lack of limiting factors and the Constitution's lack of concern with amorphous attempts to remedy social disparities—are still sound today. In any event there was no evidence or argument from respondents on this point.

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[14] At the very least, there was sufficient record evidence to preclude the district court from granting summary judgment against petitioners on the ground that respondents had a justifiable belief that promoting based on the test results would violate Title VII.

3. Diversity Is Not at Issue, Nor Is It a Compelling Interest in First-Responder Command Positions.

Whether diversity is a compelling interest that could justify the city's decision is not properly before the Court. The city admitted that its goal was not to achieve racial diversity in the fire department. Pet.App. 940a, 943a-945a, 1013a-1037a. Since the case was decided against petitioners on summary judgment, respondents' own assertion that they did not act based on an interest in diversity precluded the district court from ruling against petitioners on that basis. See *Hunt*, 526 U.S., at 552 ("[I]t was error . . . to resolve the disputed fact of motivation at the summary judgment stage."); see also *Parents Involved*, 127 S.Ct., at 2790 (Kennedy, J., concurring in part and concurring in the judgment) ("When a court subjects governmental action to strict scrutiny, it cannot construe ambiguities in favor of the State.").

In any event, the Court has never held diversity to be a compelling interest beyond the very narrow context of higher education. See *Grutter*, 539 U.S., at 324-325. *Grutter* recognized a compelling interest in diversity, defined as "a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element," as part of a "highly individualized, holistic review" of applicants. *Id.*, at 325, 337. But the Court "relied upon considerations unique to institutions of higher education," including the importance of diversity of speech and thought. *Parents Involved*, 127 S.Ct., at

2754 (plurality opinion) (citing *Grutter*, 539 U.S., at 329).

The same considerations about diversity of speech and thought in universities do not apply in public employment, especially in public-safety employment (and particularly in firefighting). Similarly irrelevant are considerations about the desirability of diversity in secondary and elementary schooling. See *id.*, at 2797 (Kennedy, J., concurring in part and concurring in the judgment). Any compelling value of diversity to promote the exchange of ideas in education has less relevance once an individual has finished being educated and is out competing in the workplace. See, *e.g.*, *Lutheran Church-Mo. Synod* v. *FCC*, 141 F.3d 344, 354 (CADC 1998) ("We do not think diversity can be elevated to the 'compelling' level. . . . "). Diversity of thought is of limited importance in firefighter promotion when weighed against merit and competence in commanding first responders to fires, natural disasters, and other catastrophes. And the interest in giving children of different races equal educational opportunities to later compete in the 'real world' of employment is very different from racially adjusting adult competition for jobs in that real world.

Further, the diversity interest the Court has recognized as compelling in higher education is an interest in nuanced and individualized overall diversity of thought and opinion, not the bare racial balancing respondents seek. The Court has already rejected as uncompelling an interest in blunt racial

diversity, condemning it as disfavored racial balancing. See, *e.g.*, *Parents Involved*, 127 S.Ct., at 2758 (plurality opinion); *Grutter*, 539 U.S., at 330. Yet, respondents rejected petitioners' promotions simply because too many of the successful candidates were white (and various concerns said to flow from that perception), and out of a desire to change the balance of those numbers. Race was "not simply one factor weighed with others in reaching a decision, as in *Grutter;* it is *the* factor." *Parents Involved*, 127 S.Ct., at 2753; see *Gratz* v. *Bollinger*, 539 U.S. 244, 271-272 (2003) ("The only consideration that accompanies this distribution of points is a factual review of an application to determine whether an individual is a member of one of these minority groups.").

At the very least, the Court should not take the pathbreaking step of extending the diversity rationale to employment without a detailed and persuasive showing of how diversity in first-responder promotions truly is a compelling government interest. This is a showing the respondents have not made, never attempted to make, and cannot make now given the lack of any evidentiary record.

4. Fear of Race-Related Political Criticism and Consequences Is Not a Compelling Interest.

Fear of "public criticism," and political unwillingness to defend Title VII suits, are not compelling interests justifying race-based action under the

Equal Protection Clause. Instead, they are exactly the sort of pressures against which the Clause is meant to be a bulwark. When race neutrality is politically popular, the Equal Protection Clause is not needed to sustain it. When it is politically unpopular, the Constitution's protections become more, not less, relevant.

D. Respondents' Action Was in Any Event Not Narrowly Tailored.

Even if the city had advanced a compelling interest to justify its actions, its remedy of cancelling promotions across the board after the test had been given and the results recorded does not even approach the constitutional requirement of narrow tailoring. There was simply no detailed evidentiary presentation to show that respondents relied "on racial classifications in a manner narrowly tailored to the interest in question, rather than in the far-reaching, inconsistent, and *ad hoc* manner that a less forgiving reading of the record would suggest." *Parents Involved*, 127 S.Ct., at 2790 (Kennedy, J., concurring in part and concurring in the judgment).

Even if there were a cognizable compelling interest in avoiding Title VII disparate-impact lawsuits, the city's race-based cancellation of promotions after a fully administered qualification process was not a narrowly tailored way to achieve it. The examinations were carefully designed to mitigate

anticipated adverse impact, even employing race-conscious measures. See *supra* pp. 7-9. No one ever proffered an equally valid alternative that would have just as accurately measured candidates' KSAs with demonstrably less disparate impact. The city was well aware earlier promotion tests had shown similar numerical disparities, Pet.App. 775a-779a, 950a-957a, 1019a-1020a, and, had the city desired, there were steps it might have taken prior to administering the tests to attempt to further reduce any anticipated disparity without overtly discriminating against petitioners because of their race. For example, the city could have provided tutoring programs and encouraged minorities with leadership potential to participate. Cf., *e.g.*, News Release, University of Texas System, Innovative Pre-Law Program Gets Dramatic Results, July 10, 2000, http://www.horizons.utep.edu/Releases/2000/July00/prelaw.html (describing program designed to assist minority students in preparing for law school). And, although potential candidates all receive roughly the same salary, the city might have made study aids available to all to encourage more candidates to prepare for the test. Pet.App. 91a, 193a, 346a-374a. None of these narrower approaches were tried.

What respondents did instead was far different. They developed and administered fair and race-neutral tests, recorded the results, coded them by race, and then discarded them after the fact, solely because of the racial distribution of the successful candidates. Far from being narrowly tailored, the

city's action was a blunt blow aimed at hammering out a crude racial balance. It needlessly stigmatized, injured, and frustrated individuals like Frank Ricci, who put time and money into studying diligently for the test despite being dyslexic, only to be told that he would not be promoted for no other reason than that he and too many other successful candidates were white. See Pet.App. 376a-378a.

E. Allowing Respondents' Action to Evade or Survive Strict Scrutiny Will Undermine Public Safety.

Petitioners endured a grueling dual-phase examination process carefully constructed to measure the KSAs deemed essential to the duties and responsibilities of commanders of first responders. Pet.App. 308a-328a, 340a-343a, 597a-650a. Forcing merit and ability to take a backseat to racial considerations would disserve public safety and efficiency by depriving the public of its most qualified servants, as determined by valid, merit-based tests. See *People Who Care*, 111 F.3d, at 535 (warning of "the almost certain consequence that the teachers it was hiring would on average not be as good as if it were on the basis purely of merit"). Fires and disasters, unlike governments, do not discriminate based on race. It will also create division within crucial institutions such as fire and police departments. It is unquestionably divisive for a government employer to administer a merits-based promotion process, encourage

candidates to sacrifice family time and resources studying for months, and then tell the successful candidates that the promotions they worked so hard for will be denied to them because too many of them are white.

II. The City's Refusal to Promote Petitioners Violated Title VII.

The city violated Title VII in refusing to promote petitioners based on overt consideration of their race without any lawful command to do so. See 42 U.S.C. §2000e-2(a)(1). Respondents' claimed interest in avoiding disparate-impact claims and liability is not a legitimate excuse for intentional discrimination. The city cannot be immunized for its adverse employment actions against petitioners simply because city officials assert a "good faith belief" that promoting petitioners might have subjected the city to disparate-impact claims from minorities that, "for political reasons," they wished not to defend. Pet.App. 21a, 47a.

Disparate impact is not unconstitutional, and numerical disparities do not by themselves violate Title VII. Rather, 42 U.S.C. §2000e-2(k) makes clear that disparate-impact liability may be imposed "only if" the challenged employment practice cannot be shown by the employer to be "job related . . . and consistent with business necessity" or the complaining party demonstrates the existence and availability of an equally valid alternative that results in less

disparate impact and the government employer "refuses to adopt" that alternative.[15] Likewise, §2000e-2(j) specifically prohibits employers from granting preferences to prevent racial imbalances. Nevertheless, the district court concluded the city need not demonstrate that any putative complainant could meet these statutorily imposed burdens and instead held that numerical adverse impact itself sufficed to permit the city to undertake "voluntary race-conscious remedies." Pet.App. 37a-38a.

The Court should reject the framework created by the district court because it misapprehends the limited ramifications that stem from numerical disparity alone and will ineluctably lead to improper race balancing. There is no justification for judicially licensing overt race discrimination that so clearly violates Title VII in response to unintended numerical disparity that, without more, does not violate Title VII. The lower courts' wide safe harbor for discriminatory government actions flouts fundamental principles of constitutional strict scrutiny, improperly makes

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[15] As the Court has noted, consistent with Title VII's aim "to achieve equality of employment opportunities," *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 429 (1971), an employer's refusal to adopt an equally valid alternative with less adverse impact provides some evidence "that the employer was using its tests merely as a 'pretext' for discrimination." *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 425 (1975) (citing *McDonnell Douglas*, 411 U.S., at 804-805). Respondents' test development efforts, focused as they were on maximizing minority opportunity, dispel any notion that they intended to use them to exclude minorities.

numerical disparities a justification for intentional discrimination against nonminorities, and irrationally encourages racial politics. The Court has never construed Title VII to permit such stark race-based treatment of individuals in the private sector, much less allowed governments to engage in it.

A. Petitioners Articulated a Valid Title VII Claim and the City's Proffered Responses Were Illegitimate and Unsupported.

Title VII makes it an "unlawful employment practice" for an employer:

> "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race . . . ; or
>
> to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race. . . ." 42 U.S.C. §2000e-2(a)(1)-(2).

Petitioners alleged a violation of this proscription by disparate treatment—that respondents "simply treat[ed them] less favorably than others because of their race." *Int'l Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 335, n.15 (1977). They did not have to

show any "formal, facially discriminatory policy," but could show respondents discriminated "on an ad hoc, informal basis." *Hazen Paper Co.* v. *Biggins*, 507 U.S. 604, 610 (1993). The "central element" of disparate treatment claims "is discriminatory intent." *Ledbetter* v. *Goodyear Tire & Rubber Co.*, 127 S.Ct. 2162, 2167 (2007).[16] Employer liability "depends on whether the protected trait . . . actually motivated [its] decision," in the sense that it "actually played a role in that process and had a determinative influence on the outcome." *Hazen Paper*, 507 U.S., at 610. In this case, petitioners' race clearly played a causal role in the decision.

The city's only proffered defense to the petitioners' claims of disparate treatment was that its actions were justified because it was trying to avoid disparate-impact claims or to voluntarily comply with Title VII. Pet.App. 938a-945a, 1013a-1037a. But Congress "provided in 42 U.S.C. §2000e-2(j) that an employer's desire to mitigate or avoid disparate impact does *not* justify preferential treatment for any group." *Biondo*, 382 F.3d, at 684. The record is full of evidence indicating that the race of petitioners drove the decision—the circulation of race-coded, name-redacted eligibility lists and blunt references to the skin color of the top candidates being only the most obvious examples. See *City of L.A., Dept. of Water & Power* v. *Manhart*,

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[16] The other element, adverse employment action, is uncontested (and uncontestable) here. Pet.App. 23a; see, *e.g.*, *Kolstad* v. *American Dental Assn.*, 527 U.S. 526, 546 (1999).

435 U.S. 702, 712-713 (1978) ("The record contains no evidence that any factor other than the employee's sex was taken into account. . . . [O]ne cannot say that an actuarial distinction based entirely on sex is based on any other factor other than sex." (quotation omitted)). Nor is political pandering to organized racial lobbies separable from petitioners' race. *E.g.*, *Adarand*, 515 U.S., at 226; see also *United States* v. *City of Birmingham*, 727 F.2d 560, 564-565 (CA6 1984) (knowingly appeasing constituents with discriminatory views may be racially discriminatory purpose). At a minimum, motive was a hotly contested factual dispute irresolvable against petitioners on summary judgment. *Hunt*, 526 U.S., at 552.

B. The District Court's Authorization of Race-Based Reactions to Numerical Disparities Adopts a Substantive Rule Independent of the Summary Judgment Framework.

The district court's determination that a governmental employer may, without fear of Title VII liability, take race-based employment action to counteract mere numerical disparate impact, Pet.App. 37a-38a, adopts a substantive rule of (non)liability independent of the evidentiary framework employed at summary judgment. Consequently, the proper resolution of this case does not ultimately turn on the analytic framework used to evaluate the claims.

Although the district court employed the familiar *McDonnell Douglas* framework, it is most often used for circumstantial cases when there is no direct evidence of the use of race and the defendant asserts a legitimate, non-race-based reason for its action. That framework seems less suitable when a plaintiff proffers direct evidence of employer use of race in its employment decisions. See *Swierkiewicz* v. *Sorema N.A.*, 534 U.S. 506, 511 (2002). As petitioners noted in the court of appeals, CA2 Reply Brief 11, 20, n.17, there is no need to recast the city's justifications for its race-based actions as race-neutral, which they are not, and then look for pretext evidence. *McDonnell Douglas* v. *Green*, 411 U.S. 792, 802 (1973).[17] Because respondents' reasons (even the purportedly legitimate ones) were all related to race, the case is more properly considered a direct-evidence case, in which respondents must demonstrate that their use of race was lawful.

But regardless of what framework applies, the evidentiary record clearly precluded granting summary judgment for respondents. There was no evidence to support their proffered defenses; at a bare minimum, there was evidence raising a genuine issue of material fact. Under a direct-evidence analysis, the record showed that respondents' motives were

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[17] Under that framework, petitioners have clearly carried their initial burden of making out a *prima facie* case of disparate treatment. See Pet.App. 437a-438a, 801a-802a; *McDonnell Douglas*, 411 U.S., at 802 & n.13.

impermissible racial motives; under an indirect-evidence analysis, it showed that respondents' proffered reasons were pretexts for discrimination.[18] Whichever framework applies, the district court erred in fashioning a legal rule that declared respondents' bare assertion of a subjective good-faith desire to avoid disparate-impact claims sufficient to immunize the employer as a matter of law.[19] Pet.App. 24a, 43a. That rule conflicts not only with the strictures of the Constitution, but also with Title VII itself.

Instead, Title VII must be read, consistently with the Constitution, to never allow intentional discrimination in order to avoid unintentional discrimination. See *supra* Part I. But at a bare minimum, a governmental actor must have a "strong basis in evidence" that goes well beyond a *prima facie* case before it could ever engage in intentional racially disparate treatment based on a purported fear of disparate-impact claims.

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[18] The weakness of respondents' claimed motivations, see *infra* Parts II.C, D, and numerous other facts provide strong evidence of pretext. For example, IOS prepared individualized candidate assessments, detailing each candidate's respective strengths and weaknesses. Respondents refused to allow failing and low-scoring candidates to have this useful tool for improvement, undercutting their claims of interest in avoiding adverse impact. Pet.App. 233a-234a, 305a.

[19] See also, *e.g.*, *Parker* v. *Sony Pictures Entm't, Inc.*, 260 F.3d 100, 112 (CA2 2001) ("It is . . . no defense to liability in a discrimination action to hold a good-faith, but erroneous, belief that the law permits taking an adverse job action on the basis of a prohibited factor.").

Croson, 488 U.S., at 500 (quoting *Wygant*, 476 U.S., at 277).

C. Respondents Did Not Have the Strong Basis in Evidence Necessary to Justify Race-Based Actions to Avoid Disparate-Impact Liability.

Respondents did not have a strong basis to believe that race-based actions were needed to avoid disparate-impact liability. To the contrary, although they had statistical evidence of adverse impact, they also possessed (or willfully ignored) knowledge that any disparate-impact lawsuit was doomed to fail, acquired as part of their admitted effort to "get to" their desired end of finding an excuse to scuttle the promotions.[20]

The framework for establishing disparate-impact discrimination, as developed in this Court's cases and as codified in 42 U.S.C. §2000e-2(k), see also *Albemarle Paper*, 422 U.S., at 425, requires much more than the mere statistical disparity respondents relied on. The city relied on the four-fifths guideline, 29 C.F.R. §1607.4(D), to determine the presence of disparate impact, but the guideline is merely "a rule of thumb for the courts," *Watson*, 487 U.S., at 995, n.3 (plurality opinion), and does not by itself establish

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[20] Pet.App. 459a (email from respondent Ude proposing Title VII strategy as "the ONLY way we get to a decision not to certify" (capitals in original)).

liability under §2000e-2(k).[21] A plaintiffs' statistical evidence of a "significantly discriminatory impact," *Connecticut* v. *Teal*, 457 U.S. 440, 446 (1982), must be coupled with either an invalid selection procedure or the refusal to adopt an available and equally valid alternative with less disparate impact. 42 U.S.C. §2000e-2(k)(1)(A) (noting that liability is established "only if" a *prima facie* case is accompanied by either type of proof); see *Albemarle Paper*, 422 U.S., at 425.

The city knew its exams were content-valid, dispelling any inference of discrimination that arose from the existence of a *prima facie* case. See *St. Mary's Honor Ctr.* v. *Hicks*, 509 U.S. 502, 510-511 (1993); *Tex. Dept. of Cmty. Affairs* v. *Burdine*, 450 U.S. 248, 255 & n.10 (1981) ("A satisfactory explanation by the defendant destroys the legally mandatory inference of discrimination arising from the plaintiff's initial evidence."). IOS had validated the exams for content and job-relatedness during their development in accordance with EEOC guidelines, conducted a post-exam analysis of scoring results, and stood ready to deliver the customary technical report elaborating on its oral opinions of validity, until city officials cut it off. Pet.App. 329a-339a. Thus the city could have—and knew or willfully endeavored to avoid knowing it could have—discharged its burden

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[21] By contrast the district court concluded that even less than a *prima facie* case can authorize intentional reverse discrimination. See Pet.App. 38a (citing *Bushey* v. *N.Y. State Civil Serv. Comm'n*, 733 F.2d 220, 228 (CA2 1984)).

under *Albemarle Paper* "of proving that its tests [were] job related." 422 U.S., at 425. This was all it needed to do to raise a viable defense to any prospective disparate-impact claims based on the exams, a defense that would be effectively complete given the absence of any evidence that it was presented with and refused to adopt some equally valid alternative with less adverse impact. See *ibid.*; 42 U.S.C. §2000e-2(k)(1)(A).

Having resigned themselves to the exams' content-validity, and although not obligated to do so under the statute, respondents investigated the existence of alternatives to justify denying petitioners the promotions they earned. But no one established the existence and availability of an equally valid alternative with demonstrably less disparate impact, and the city has never claimed it was presented with one.[22] Hornick emphatically did not identify any such alternative. He specifically stated that he was "not suggesting that I/O Solutions somehow created a test

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[22] Respondents initially relied in the district court on petitioners' admissions that there existed "alternative selection procedures . . . that have less adverse impact." Defs.' Memo in Support of Motion for Summary Judgment (Dkt. No. 52) 17-18. But petitioners never admitted such alternatives were job-related, let alone content-valid to the same high degree as IOS's exams or reasonably available to the city. See Pls.' Rev. Memo. of Law in Opp. to Defs.' Motion for Summary Judgment (Dkt. No. 81) 48-52; CA2 Appellees' Br. ADD-18, 30. Respondents subsequently abandoned this tack for the argument that they had a "good faith" belief there might be a suitable alternative. BIO 9; Pet.App. 1017a.

that has adverse impacts that it should not have had," Pet.App. 556a, and instead suggested that because adverse impact is common in written and oral knowledge examinations, the city might in the future dispense with them altogether and try an approach he called the "assessment center process." Pet.App. 557a-558a.[23] In the meantime, Hornick recommended that the board proceed with the promotions. Pet.App. 558a. As the district court acknowledged, Hornick never specifically explained what an assessment center approach would have entailed or that it would have demonstrably less adverse impact. Pet.App. 32a.[24]

Instead, the city asserts that it need only assert a "good faith belief" that less discriminatory alternatives exist. BIO 9; Pet.App. 1017a. In response to the

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[23] The district court's suggestion that the oral examination might have been given more weight, Pet.App. 33a, was contradicted by Hornick's statement that there was more disparate impact in the oral component, Pet.App. 550a, although Lewis concluded that the heavy concentration of minority assessors made the oral component "pretty much beyond reproach," Pet.App. 566a.

[24] The city's information on alternatives fell far short of the detailed EEOC guidelines on alternative selection procedures, which require any proposed alternative be proven content-valid before a decisionmaker may adopt it. See 29 C.F.R. §1607.3(B). Certainly none of Hornick's statements provided the city with any acceptable evidence on the potential validity of other exams or methods. See *id.* §1607.9(A) ("[s]pecifically rul[ing] out . . . testimonial statements and credentials of sellers, users, or consultants; and other nonempirical or anecdotal accounts of selection practices or selection outcomes").

district court's inquiry, the city insisted that identifying alternatives was "for a different day," as respondents wished to conduct "studies" and continue to "explore" it. Pet.App. 1022a-1024a, 1027a, 1030a-1033a. The lower courts reasoned that having no good alternative to the exams was enough to justify abandoning the promotions. Supp.Pet.App. 2a (city had "no good alternatives"); see also Pet.App. 34a (noting "the shortcomings in the evidence on existing, effective alternatives" with less disparate impact). But "no good alternative," by its own terms, is not an *equally valid* alternative.

The city knew it had a rock-solid and complete exam-validity defense to any disparate-impact claim and that because it had not refused any legally sufficient alternatives, potential claimants could not defeat that defense. The city's rationale raised in response to petitioners' case, that it was attempting to avoid Title VII liability, was not only unsupported but indeed contradicted by the summary judgment evidence. The record made clear that the city's reasons were racial and that to the extent it was articulating any nonracial reasons, they were pretextual. Yet the lower courts declared an admittedly feeble putative claim of unintentional disparate impact (plus the city's bare assertions of "good faith") a summary-judgment winner over a clear case of intentional race-based discrimination.

Far more stringent curbs on government employers' justifications for self-initiated race-based deprivations are necessary to provide "adequate safeguards

against the danger" of Title VII disparate-impact liability evolving into a rationale for imposition of de facto quota systems. *Watson*, 487 U.S., at 993 (plurality opinion). Otherwise, employers claiming "good faith" will always be able to simply leapfrog from racial disparity directly to remedies that discriminate against nonminorities and establish de facto racial quota systems. Indeed, any rational employer will feel compelled to do so, if they can be sued for disparate impact based on mere numbers but can never be sued for cancelling promotions. The EEOC's four-fifths "rule of thumb" will become a Procrustean bed into which all selection results will be made to fit.

It is also necessary to preserve Title VII's protections of bona fide merit systems like those required by Connecticut law, and job-related ability tests implementing them, 42 U.S.C. §2000e-2(h); see also *Teal*, 457 U.S., at 452. Similarly, 42 U.S.C. §2000e-7's narrow limitation of the preemptive effect of Title VII "reflects the importance Congress attached to state antidiscrimination laws in achieving Title VII's goal of equal employment opportunity," a goal shared by the merit-selection features required by Connecticut state law and the New Haven city charter. *Cal. Fed. Sav. & Loan Assn.* v. *Guerra*, 479 U.S. 272, 283 (1987); see *id.*, at 290, n.29 (Title VII overrides "only those state laws that expressly *sanction* a practice unlawful under Title VII," not "state laws that are silent on the practice"). In recognizing a disparate-impact theory, the Court noted that "the very purpose of Title VII is to promote hiring on the basis of job

qualifications, rather than on the basis of race or color." *Griggs*, 401 U.S., at 434. And Congress reaffirmed this commitment in 1991 with its enactment of §2000e-2(*l*). See *infra* Part II.E. That purpose is thwarted in a basic and intuitively unfair way if content-valid promotion exams designed to select candidates based on their job qualifications can be discarded based on mere numbers, speculation about alternatives, and an *ipse dixit* of good faith. See *Firefighters Local Union No. 1784* v. *Stotts*, 467 U.S. 561, 575 (1984) ("[I]t is inappropriate to deny an innocent employee the benefits of his [merit] in order to provide a remedy in a pattern-or-practice suit such as this.").

Moreover, as the Court has recognized, the argument for allowing fears of tort liability to serve as a defense to Title VII liability for intentional discrimination rests on "unpersuasive propositions" in any event. *Automobile Workers* v. *Johnson Controls, Inc.*, 499 U.S. 187, 210 (1991). And for public employers in particular, discriminatory "voluntary compliance" must be based on strong evidence that it is really required to prevent an actual violation of Title VII. Cf. *Shaw*, 517 U.S., at 908, n.4.

It is clear from the circumstances of this case that the city's disparity-plus-good-faith formulation is effectively nothing more than a disparity test, because it would require neither a showing of content-invalidity nor an actual, concrete equally valid and available alternative with less disparate impact. In practice, that standard would permit outright racial

balancing, because it affords no weight to individuals' strong constitutional interest against being classified and differentially treated by the government because of their race. It is no great imposition to require government employers to ensure that a potential disparate-impact claim under §2000e-2(k) has a strong evidentiary basis before they may even consider engaging in intentional race-based disparate treatment, certainly not when both the Constitution and Title VII's core purposes are to prevent such treatment in all but the rarest of circumstances. See *supra* Part I; see also 42 U.S.C. §2000e-2(e)(1) (allowing race-based employment practices only when required by bona fide occupational qualifications).

At a bare minimum, employers cannot be permitted to infer discrimination from a purported *prima facie* case, when all the available evidence dispels that inference by indicating that their tests were job-related and that no equally valid, available alternatives existed that would have less adverse impact. See *Burdine*, 450 U.S., at 255 & n.10. They cannot be allowed to rebuff uncontroverted evidence that their tests were valid in order to claim that the putative *prima facie* case retained sufficient probative force to justify a race-conscious remedy that injures the successful applicants. Cf. *McQuiddy* v. *Ware*, 20 Wall. 14, 19 (1873) ("It will not do to remain willfully ignorant of a thing readily ascertainable.").

D. Respondents Did Not Have the Strong Basis in Evidence Necessary to Justify Race-Based Actions Purportedly Taken to Voluntarily Comply with Title VII.

Respondents' claimed wish to voluntarily comply with Title VII is similarly insufficient to justify race-based responses to numeric disparities and is unsupported in the summary judgment record. The disparate-impact case was weak. See *supra* Part II.C. There was no past discrimination to remedy, nor any claim in the district court of a "conspicuous imbalance in traditionally segregated job categories." *Johnson* v. *Transp. Agency, Santa Clara County*, 480 U.S. 616, 630 (1987) (quoting *United Steelworkers of America* v. *Weber*, 443 U.S. 193, 209 (1979)).[25] The city thus had no basis at all to believe that its race-motivated actions "further[ed] Title VII's purpose of eliminating the effects of discrimination in the workplace," *ibid.*, rather than simply fostering discrimination where none had previously existed.

The rulings below authorize such discrimination whenever a test displays racially disproportionate results, without any basis for inferring that the test itself was in fact discriminatory—indeed, even in the face of evidence dispelling the possibility of inferring discrimination. Race-motivated actions in such a context are, at best, "inappropriate prophylactic

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[25] Indeed, African-Americans have occupied the highest levels of command in the NHFD. J.A. 215-219.

measures" adopted in a misbegotten effort to eliminate "the myriad of innocent causes that may lead to statistical imbalances in the composition of [employers'] work forces." *Watson*, 487 U.S., at 992 (plurality opinion). At worst, they are simply smokescreens for impermissible race quotas. Either way, they violate Title VII.

The terms of Title VII's prohibition of adverse employment actions against "any individual" because of "such individual's race" "are not limited to discrimination against members of any particular race." *McDonald* v. *Santa Fe Trail Transp. Co.*, 427 U.S. 273, 278-279 (1976). Title VII thus "prohibits racial discrimination against the white petitioners in this case *upon the same standards* as would be applicable were they [African-Americans]." *Id.*, at 280 (emphasis added).

"Voluntary compliance" cannot extend to refusing to hire or promote successful candidates in a legitimate and fair qualifying process based merely on numerical disparity—certainly not in public employment. Under the city's view of the permissible scope of voluntary compliance, however, intentional discrimination against nonminorities is an acceptable means of achieving racial proportionality in the workforce, without any requirement that an employer determine whether it is "voluntarily complying" with any actual statutory command. Title VII does not "impose a duty to adopt a hiring procedure that maximizes hiring of minority employees." *Furnco Constr. Corp.* v. *Waters*, 438 U.S. 567 (1978); cf. *Shaw*,

517 U.S., at 908, n.4 ("[A] State may have a compelling interest in complying with the properly interpreted Voting Rights Act. But a State must also have a 'strong basis in evidence' for believing that it is violating the Act." (quotation omitted)). And the desire to increase opportunities for minority employment cannot justify acts of intentional disparate treatment. *Furnco Constr.*, 438 U.S., at 579 ("A racially balanced work force cannot immunize an employer from liability for specific acts of discrimination."). "[T]he 'bottom line'" of a racially balanced result "does not . . . provide [an] employer with a defense" to liability for discriminatory actions against individuals, regardless of their race. *Teal*, 457 U.S., at 442.

Respondents' claims of good faith[26] add nothing to their unsupported claims of voluntary compliance. Mere good faith provides no defense to an intentional discrimination claim. In cases in which "the employer may simply be unaware of the relevant federal prohibition" or "discriminates with the distinct belief that its discrimination is lawful," good faith may serve to bar punitive damages, but it does not operate as a defense to liability. *Kolstad*, 527 U.S., at 536-537.

Nor is there support for the city's broad voluntary-compliance rationale in *Johnson* or *Weber*. The city expressly disclaimed acting to remedy past

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[26] While denying that any "good faith" defense exists, petitioners introduced a wealth of evidence that respondents acted in bad faith. See *supra* pp. 10-14.

discrimination, Pet.App. 945a, and never claimed in the district court that it was acting "to eliminate a manifest racial imbalance" in "traditionally segregated job categories." *Weber*, 443 U.S., at 208-209; see *Johnson*, 480 U.S., at 631-632 (requiring these features to justify voluntary measures assures consistency in achieving statute's purpose while not unduly harming other employees).

Nor did the city act pursuant to a preexisting affirmative action plan; it acted only in an *ad hoc* manner after tests were administered. Pet.App. 944a-945a; cf. *Johnson*, 480 U.S., at 641 (upholding gender-based choice between two equally qualified candidates under preexisting affirmative action plan that permitted consideration of prohibited factors as "but one of several factors that may be taken into account in evaluating qualified applicants"). The city's *ex post* decisionmaking is highly suspect, open as it was to impermissible pressures such as racial politics, cronyism, and racial balancing, as substantial evidence shows actually occurred. Its refusal to promote petitioners effectively imposed a racial quota, reserving an easily determinable number of promotion slots for African-Americans, transmuting the EEOC's four-fifths guideline into a mandate for racial proportionality. See J.A. 225-226.[27] And race was the sole factor

[27] Had the city employed the rule-of-three to maximize the number of minorities promoted, the 16 lieutenant vacancies open as of December 16, 2005, would have been filled by 13 whites and 3 blacks. See Pet.App. 429a-432a (race-coded rankings), 384a

(Continued on following page)

weighed in deciding not to promote petitioners. These facts betray the city's preference for "mere blind hiring by the numbers," a goal *Johnson* "emphatically did *not* authorize" and which indicates the validity of the city's action "fairly could be called into question." 480 U.S., at 636-637.

E. Respondents' Refusal to Honor the Exams' Outcome Contravened 42 U.S.C. §2000e-2(*l*).

Respondents' bold rejection of test results on the basis of petitioners' race is also independently prohibited by 42 U.S.C. §2000e-2(*l*). As part of the 1991 amendments to Title VII, Congress, in plain terms, declared:

> "It shall be an unlawful employment practice for a respondent, in connection with the selection [of] . . . candidates for . . . promotion,

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(number of vacancies), 235a-236a, 305a-306a (three African-Americans). This pattern would have meant a selection rate of 50% among white candidates who passed the lieutenant exam. See J.A. 225-226 (number of passing candidates by ethnic group). Thus, to achieve a 40% minority selection rate and meet the four-fifths guideline, the city would have had to promote 3 of the 6 passing black candidates, which it could have, and 2 of the 3 passing Hispanic candidates, which it could not at that time. See *ibid.*; Pet.App. 429a-432a. For captain, the city could have satisfied the four-fifths guideline for Hispanics but would have been 2 African-Americans short. See Pet.App. 434a-436a. That is, the city denied 5 highly qualified minorities well-deserved promotions—to their dismay, see Pet.App. 420a-422a—solely because it could not also promote 4 other minorities who had not qualified.

> to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race . . . ." 42 U.S.C. §2000e-2(*l*).

Title VII unambiguously prohibits altering test results. "[A] statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *Duncan* v. *Walker*, 533 U.S. 167, 174 (2001) (quotation omitted). Aside from expressly forbidding the modification of scores and the use of different cutoff scores, the statute includes a broad proscription on "otherwise alter[ing]" test results on the basis of race.

The catch-all phrase encompasses the myriad means to manipulate test scores and results on the basis of race. The statute's expansive language conveys that any tactics designed to achieve the same prohibited objectives are forbidden. Just as using different score cut-offs and altering scores is impermissible, negating the entire results of valid examinations is barred. Ignoring and refusing to act on results to avoid a disfavored racial distribution causes even greater harm than piecemeal alterations. Rather than protect the integrity of test administration and merit-based advancement, the statute would instead be misused to confer a perennial mulligan right to the detriment of disfavored racial groups. This anomalous outcome would short-circuit §2000e-2(*l*) to allow racial discrimination in contravention of the express statutory language.

The legislative history of §2000e-2(*l*) confirms that abandonment of test results on the basis of race violates the statute. Congress enacted Title VII in 1964 to eliminate discrimination in employment. But despite the passage of Title VII, the adjustment of civil service examination results to achieve desired racial outcomes became increasingly prevalent. By 1991, thirty-four states utilized the procedure of "race norming," whereby test scores are altered so that the mean score is the same for each race. 137 Cong. Rec. H3930 (daily ed. June 5, 1991). Reasoning that "[a]ctual scores become meaningless and the job relatedness value of these tests is subsumed in favor of achieving a certain racial or ethnic mix," Congress found such practices to be "totally inconsistent with the principles and intent of title VII." *Ibid.* Congress responded by outlawing race-based manipulation of test results. See *Dean* v. *City of Shreveport*, 438 F.3d 448, 463 (CA5 2006) (emphasizing that statutory compliance with §2000e-2(*l*) "is required at all times").

Congress's intent was to enact a broad proscription: "The language of the section is broad and is designed to prohibit any action taken to adjust test scores, use different cutoff scores for selection or promotion, or otherwise adjust or alter in any way the results of employment-related tests on the basis of race, color, religion, sex, or national origin." 137 Cong. Rec. H9529 (daily ed. Nov. 7, 1991). And it intended no exception based on purported "disparate impact" in test scores: "race-norming may not be ordered by a

court as part of the remedy in any case, nor may it be approved by a court as a part of a consent decree, when done because of the disparate impact of those test scores." *Id.*, at 9547. Congress's stated goal was to establish "a level playing field" and to ensure "selection based on merit" for "applicants and workers of all races, ethnic groups, and genders," *id.*, at H9529, whereby "[e]veryone taking a test is doing so on an equal basis." 137 Cong. Rec. E2122 (daily ed. June 7, 1991). An employee is not taking a test on an equal basis or level playing field if her employer is able to throw the test out any time "too many" people of her race do well.

The district court rejected petitioners' §2000e-2(*l*) claim on the rationale that the subsection prohibits only race-norming of scores and that no race-norming was "alleged to have happened here." Pet.App. 39a. The court concluded that "the 1991 amendments do not affect the reasoning and holding" of either *Kirkland* v. *New York State Department of Correctional Services*, 711 F.2d 1117 (CA2 1983), or *Bushey* v. *New York State Civil Service Commission*, 733 F.2d 220 (CA2 1984), that disparate pass rates between members of different race groups "justify voluntary race-conscious remedies." Pet.App. 39a. But §2000e-2(*l*) was passed in reaction to just such holdings, and Congress expressly rejected cases sanctioning the manipulation of test results to eliminate or mitigate a purported disparate impact. See, *e.g.*, 137 Cong. Rec. H9547 (daily ed. Nov. 7, 1991). Relying on case law superseded by §2000e-2(*l*) to allow circumvention of the provision negates the statutory text, ignores the

legislative history, and thwarts the purposes the statute was designed to achieve. The Court should reject that cramped interpretation.

F. The Judgment Conflicts with the Policies Underlying Title VII.

Respondents' vision of Title VII allows blatant intentional discrimination against nonminorities in order to avoid even a whisper of potential unintended disparate impact against minorities, and it gives government employers essentially unreviewable discretion to "voluntarily comply" with the statute by discriminating. It makes it trivially easy for government employers to play racial politics and to cover reverse discrimination by purportedly attempting to avoid alleged disparate impact even when they know to near-certainty they could never be held liable. That vision "runs counter to statutory policy" set out in Title VII and should be rejected. *Stotts*, 467 U.S., at 583, n.17.

"The statute's primary objective . . . [is] chiefly, not to provide redress but to avoid harm." *Kolstad*, 527 U.S., at 545 (quotations omitted). And the harms it seeks to avoid are harms to minority or nonminority individuals in equal measure. See *McDonald*, 427 U.S., at 280; *Griggs*, 401 U.S., at 431 ("Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed."). Thus, Title VII must forbid employers to choose definite intentional disparate treatment of one racial

group to avoid a mere potential for unintentional disparate impact upon another racial group. The statute's purpose of avoiding harm cannot be served by allowing the imposition of *actual* harm in order to avoid *potential* harm.

The district court's construction forces innocent nonminorities, solely because of their race, to shoulder the burden of advancing employment opportunities for minority candidates by denying them the protections of a bona fide merit system even without any showing of intentional discrimination against minorities. While "[c]ooperation and voluntary compliance were selected as the preferred means for achieving" the goals of Title VII, *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44 (1974), the Court has nonetheless recognized that such voluntary compliance cannot "be paid for" with the rights of innocent third parties, see *W.R. Grace & Co.* v. *Rubber Workers*, 461 U.S. 757, 771 (1983).

Permitting unilateral "voluntary compliance" to contravene individual employees' rights against nondiscrimination completely undermines the policy that voluntary compliance was meant to serve. *Ibid.* The laudable premise of encouraging employers to voluntarily meet their obligations not to discriminate should not in any event be twisted into a mechanism for fostering *sub rosa* discrimination against nonminorities. "[W]hatever factors the mechanisms of compromise may legitimately take into account[,] . . .

under Title VII race may not be among them." *McDonald*, 427 U.S., at 285.

CONCLUSION

For these reasons, the judgment of the Second Circuit should be reversed.

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February 19, 2009

124

Nos. 07-1428 & 08-328

FILED
MAR 18 2009
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

FRANK RICCI, *et al.*,

Petitioners,

v.

JOHN DESTEFANO, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF ON THE MERITS

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QUESTIONS PRESENTED

1. Whether respondents' failure to certify the results of promotional examinations violated the disparate-treatment provision of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a).

2. Whether respondents' failure to certify the results of promotional examinations violated 42 U.S.C. § 2000e-2(*l*), which makes it unlawful for employers "to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race[.]"

3. Whether respondents' failure to certify the results of promotional examinations violated the Equal Protection Clause of the Fourteenth Amendment.

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RESPONDENTS' BRIEF ON THE MERITS

INTRODUCTION

The results of promotional examinations for supervisors in the City of New Haven's Fire Department reflected a severe disparate impact. In response to this red flag that the tests may have been flawed, the City's Civil Service Board conducted five public hearings, over a period of two months, to consider whether to certify the results. The evidence before the Board raised further concerns that the tests had not in fact identified the most qualified candidates and suggested less-discriminatory alternatives. In the end, citing concerns about flaws in the tests, two of the four Board members voted against certification, leaving the test results uncertified and the supervisor positions open.

This response by the City—when faced with examination results that had a severe disparate impact and evidence substantiating the inference of discrimination—was both narrow and prudent. The City did not adjust test scores to benefit minority candidates, adopt affirmative-action policies, or engage in racially proportional promotions. Rather, upon having its concerns reinforced by a deliberative, open process, it simply declined to use the results.

Under petitioners' view, Title VII and the Constitution *required* the City to certify the test results. Yet the rule petitioners seek to impose—that employers make promotions first and sort out the problems with a test later—is not what Title VII or the Constitution demands. Neither Title VII nor the Constitution compels an employer to proceed with promotions based on employment tests in the face of well-grounded questions about the validity or legality of the tests. On the contrary, Title VII and the Constitution permit, indeed favor, the City's limited and reasoned race-neutral action.

STATEMENT OF FACTS

1. In 2003, the City of New Haven sought to fill lieutenant and captain vacancies in the Fire Department. According to a local union contract, promotions were to be made based on exams with written and oral components weighted 60% and 40% respectively. Pet. App. 606a. To qualify even to take the tests, candidates for lieutenant had to have 30 months of experience in the New Haven Fire Department, a high school diploma, and training courses in related subjects. Pet. App. 352a. Candidates for captain needed one year as a "certified fire lieutenant" in the Department, a high

school diploma, and formal training courses in related subjects. Pet. App. 365a.

The City retained a consultant, Industrial/Organizational Solutions, Inc. ("IOS"), to develop and administer these exams. CAJA382. IOS interviewed incumbent lieutenants and captains, sent out job questionnaires (Pet. App. 614a-618a), asked the chief and assistant chief of the Department to identify relevant source material (Pet. App. 625a), and created a multiple-choice written test for each position, drawing on 1200 pages of source material (JA49; *see* Pet. App. 353a-359a, 367a-371a).

IOS did not, however, pursue a process known as an "Angoff workshop" (Pet. App. 698a), which enables a test-developer to "establish a content-valid, legally defensible cut-off score for the examination[]" (Pet. App. 321a; *see* Pet. App. 311a, 698a). Although IOS's proposal to the City had stated that it would use three fire experts from Chicago (Pet. App. 321a) to perform this "very critical process," IOS ultimately skipped it and used the City Charter's cut-off of 70 (Pet. App. 77a, 698a). IOS conceded that using the "conventional cut-off" of 70 "isn't very meaningful when you are trying to find ... the cut-off score that defines minimally competent or minimally qualified, which is ultimately what you are looking to do in a situation like this." Pet. App. 697a.

Lacking a relevant cut-off score, IOS designed difficult tests. Pet. App. 698a-699a. Recognizing that "more difficult tests tend to have greater levels of adverse impact," it stated, "we are not going to create an exam to try and cater to the fact that the test won't have adverse impact." Pet. App. 698a; *see* Pet. App. 685a-686a.

"Standard practice" would have required review of the written tests by New Haven fire experts to ensure, among other things, that the content reflected an accurate understanding of New Haven rules and practices. Pet. App. 635a. The City had decided, however, in order to safeguard the integrity of the testing process (there had been allegations of cheating on past exams (Pet. App. 601a)), that no one from New Haven would review the tests prior to administration. Pet. App. 508a-509a, 635a-636a. IOS did not provide for review by other experts, save for a single battalion chief from the Atlanta area. Pet. App. 509a.

Candidates took the written and oral tests in November and December 2003 (CAJA700-701), and in late December, IOS provided the scores to the City (JA221).

2. Shortly thereafter, on January 9, 2004, a Connecticut state court issued a decision restricting the City's use of civil service exam results. CAJA1706-1720. Previously, New Haven had interpreted the so-called "Rule of Three" in the City Charter, which requires that a promotion be awarded to an individual receiving one of the top three scores on the relevant exam (Pet. App. 77a), as follows: Scores were rounded to the nearest integer (on the understanding that minute score differences were not statistically meaningful (*see* CAJA1701)), with each rounded score level constituting a "rank"; and the City could promote from the top three ranks for each position.[1] Although state

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[1] In other words, if three candidates scored 90.9, 90.8, and 90.7, the City would round their scores to 91 and band them in a single rank (of 91) for purposes of the Rule of Three. *See Kelly* v. *City of New Haven*, 881 A.2d 978, 993-994 (Conn. 2005) (explaining

courts had previously disagreed with the City's interpretation as a matter of local law,[2] none of these courts had found that the City's interpretation or its application was in any way related to race,[3] and the City had continued to press its legal argument until the January 9, 2004 injunction (CAJA1707). The state court injunction, which prohibited this rounding procedure, constrained the City's authority with respect to these tests. Pet. App. 443a-444a.

3. When City officials reviewed the results of the tests, they found significant and unexpected racial disparities. CAJA700-702. The pass rate of black candidates on both the lieutenant exam and the captain exam was approximately one-half the corresponding rate for white candidates.[4] More jarringly, under the new Rule of Three, out of the nineteen possible candidates for

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the City's previous method). Under a Fire Department practice not required by the Rule of Three, the Department ordered candidates within a rank by seniority. *Id.* at 995; *see also Broadnax* v. *City of New Haven*, 851 A.2d 1113, 1120 n.9 (Conn. 2004) (City's authority broader than Fire Department practice).

[2] The City's interpretation was based on a 1993 Charter revision that changed the Rule of Three to address the top three "scores" rather than the top three "applicants." CAJA1685-1688.

[3] *See Bombalicki* v. *Pastore*, No. 378772, 2001 WL 267617 (Conn. Super. Feb. 28, 2001) (unpublished); *Henry* v. *Civil Serv. Comm'n*, No. 411287, 2001 WL 862658 (Conn. Super. July 3, 2001) (unpublished); *see also Hurley* v. *City of New Haven*, No. 054009317, 2006 WL 1609974 (Conn. Super. May 23, 2006) (unpublished); *Kelly*, 881 A.2d 978. Petitioners' statement to the contrary (Br. 29) is false. *See also infra* p. 39 & n.34.

[4] In both cases, the pass rate for black candidates was 52% of the corresponding rate for white candidates. *See* JA225-226.

promotion (for fifteen positions), none would be African-American. JA223-224.

These results were starker than under previous tests. Although prior tests had also reflected disparities, African-Americans had placed higher and had been available for promotions. JA218-219; CAJA734. The highest-ranked African-American candidate for lieutenant ranked third in 1996 and fifth in 1999, but thirteenth on the 2003 test. JA218. For captain, the highest-ranked African-American candidate had been fifth in 1998, but was fifteenth under the 2003 test. JA219.

The City invited IOS to discuss the tests and the results. IOS strenuously defended them. Pet. App. 670a. City officials, by contrast, believed that the severe disparate impact triggered a duty to inquire further and referred the issue to the Civil Service Board. JA221-222.

4. The Civil Service Board is an independent five-member organ of the City that administers the City's civil service employment system, including by supervising the process of competitive examinations and reviewing their results before certifying lists of eligible candidates. Pet. App. 74a-77a.

The Board held five hearings over a period of two months to consider whether to certify the test results.[5] All of the meetings were public, and the Board made clear that *ex parte* contacts were prohibited. CAJA768, 798. The Board stressed that it, and not City officials, would make the ultimate decision. CAJA819-820. Be-

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[5] For excerpts of the hearings see JA22-169 and Pet. App. 465a-589a; for the complete transcripts see CAJA698-1162.

cause of a potential conflict (and at the request of petitioners' counsel), one of the five Board members (the only African-American on the Board) did not participate, leaving the Board with only four members to resolve the certification question. CAJA812-814, 875. The Board heard testimony from multiple sources on all sides of the issue.

a. A City official presented the Board with the test results, as well as data showing that the IOS examinations had produced a "stark[er]" disparity than had previous exams for these positions. JA24, 155.

The City's then-Corporation Counsel, Thomas Ude, informed the Board about the disparate-impact standard in employment discrimination law. JA134-144. He explained that a "significant adverse impact ... triggers a much closer review, a much closer examination, because it's like setting off a warning bell that there may be something wrong." JA152; *see also* CAJA1012.

b. A number of firefighters testified that the exams tested material that was irrelevant in New Haven or contrary to New Haven firefighting policies. JA44-48; JA67-70. The source material also contained contradictory information on the same subject matter (CAJA786)—a problem that had been acknowledged previously by IOS (JA19-21). Other firefighters (including three petitioners), however, defended the tests, contending that they should be certified. CAJA772-773, 784-789, 1139-1142, 1145-1148.

c. Numerous members of the community testified. The head of the local union suggested that the Board hear from an independent expert. CAJA807-809. A representative from an organization of black firefighters noted that the nearby city of Bridgeport, which had experienced similar issues in the past, currently

used different relative weightings of oral and written exam components as compared to New Haven, and faced less disparate impact than it had before. JA64-66. Boise Kimber, an African-American minister and a member of the board of fire commissioners, testified that African-Americans were underrepresented in the Fire Department. CAJA769-771. Kimber stated that, because there were no African-Americans among the four sitting Board members, the Board lacked legitimacy to decide the question—an assertion to which Board members took strong offense. CAJA875-882.

Although a representative of white firefighters (petitioners' counsel in this case) and a representative of black firefighters both stated they would sue the City depending on the decision (CAJA816-817, 838), the Board stressed that it would not be motivated by a fear of litigation (CAJA738).

d. The developer of the tests, IOS's Chad Legel, testified in defense of the tests.[6] He explained that because of the City's decision to forgo internal review, no one in the City had reviewed the tests before they were given (CAJA936)—a fact that surprised Board members (CAJA982). When members of the Board asked Legel to suggest how they could independently verify the exams, he answered that any layperson could look at the tests and tell whether they were biased. CAJA996-997. The Board Chairman was skeptical that "a couple of people off the street" would be able to assess the tests. CAJA1001-1002.

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[6] IOS also had sent a letter to City officials defending its exams; in its live testimony, IOS presented the same arguments to the Board that appear in its letter. *Compare* Pet. App. 337a-339a *with* Pet. App. 501a-536a.

e. In search of more information, the Board sought to hear from independent experts. The local union suggested Dr. Christopher Hornick, an industrial psychologist in the same field as IOS. JA159. Hornick testified that he was "a little surprised at how much adverse impact there is in these tests," since he saw "significantly and dramatically less adverse impact in most of the test procedures that we design." JA93-94. Hornick also raised questions about whether a multiple-choice knowledge-based examination is an appropriate way to select fire officers: Such tests, he explained, measure the ability "to just memorize and give the correct answer from a multiple choice" (JA103), and there are other testing methods that are "much more valid in terms of identifying the best potential supervisors" (JA96). Hornick identified "situation judgment tests" or, alternatively, "assessment center[s]" as methods that "would have increased the likelihood of getting the best candidates at the top of the list[.]" JA102.

A second expert, Vincent Lewis, an experienced firefighter, stated that the tests were comparable to examinations he had taken in the past. JA114. A third expert, Dr. Janet Helms, spoke about general problems of race and culture in testing. JA120-133.

f. The Board held a fifth and final meeting. Ude provided further legal analysis. He stated that the relevant inquiry is "whether an examination is ... really testing for what you're looking to test for[.]" JA137. He had reviewed a New Jersey case in which a fire department promotional examination was held invalid because it had tested candidates' "ability to recall what was in a particular text [more] than their firefighting or supervisory abilities." JA137-138. Ude noted that some questions on the New Haven exam were quite

similar to those discussed in the opinion in the New Jersey case. JA138, 148.[7] Ude expressed concern that the New Haven examinations had not "served th[e] purpose ... [of] find[ing] good supervisors[.]" JA142. The City's Director of Personnel said, similarly, that "upon closer review of these two exams, their content has raised, rather than answered, questions about how valid these tests are for the purposes intended." JA156.

g. At the end of this fifth meeting, the Board members held a public vote. JA160-169. Two Board members voted to certify the exams, and two, Malcolm Webber and Zelma Tirado, voted not to certify. JA165-169. Tirado explained that she believed that "the process was flawed" and that "the test was flawed." JA167. Webber also voted no, explaining: "I originally was going to vote to certify. That was my original feeling before we got into the testimony. But I've heard enough testimony here to give me great doubts about the test itself and ... some of the procedures. And I believe we can do better." JA166.

Because of the split vote, the results could not be certified. *See* JA169. There is no evidence whatsoever that the Board in general (or Webber or Tirado in particular) was improperly influenced by any advocates on either side of the debate.

5. Had the Board certified the exam results, under the City's Charter, the list of eligible candidates would have been sent to the board of fire commission-

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[7] The case referenced was *Vulcan Pioneers, Inc.* v. *New Jersey Department of Civil Service*, 625 F. Supp. 527 (D.N.J. 1985), *aff'd*, 832 F.2d 811 (3d Cir. 1987).

ers. CAJA1363. That board, in turn, would have selected lieutenants and captains from the list with the limited discretion provided under the Rule of Three. Presence on the list would thus not have guaranteed any individual candidate a promotion. *See Bombalicki* v. *Pastore*, No. 378772, 2001 WL 267617, at *4 (Conn. Super. Feb. 28, 2001) (unpublished).

Under its contract with the City, IOS was also required to prepare a "technical report" (which petitioners also refer to as a "validation study") detailing the steps it took in designing the tests. Pet. App. 326a-327a, 596a. IOS did not provide this report to the City. Pet. App. 597a. It never offered to do so (CAJA462), and there is no evidence that the City attempted to prevent IOS from preparing a technical report. According to IOS, the technical report was not "a necessary document," since the technical report would only summarize "other documents that already existed[.]" Pet. App. 597a; *see* Pet. App. 338a (letter from IOS to City stating that "there is nothing further we can add concerning the development and administration of the tests"). Notably, such a report would not have proved whether the tests were in fact "valid," *i.e.*, whether the tests actually identified the most qualified candidates; rather, it would have described the test development process (Pet. App. 596a).

6. Several months later, and before the City could decide how to proceed, petitioners filed the present action, effectively freezing the promotional process (Pet. App. 1013a-1014a). Petitioners' suit alleged, *inter alia*, a Title VII claim against the City and equal protection claims against the City and seven individuals, including the two Board members who voted not to certify.

JA194-196.[8] Following discovery, both sides moved for summary judgment. JA3-4. The district court granted respondents' summary judgment motion on the Title VII and equal protection claims. JA12; Pet. App. 6a.[9] The Second Circuit affirmed and then voted to deny rehearing en banc. JA16.

SUMMARY OF ARGUMENT

This case raises the question of what an employer may do, consistent with Title VII and the Equal Protection Clause, when faced with an employment test that appears to violate Title VII's disparate-impact provisions. Petitioners claim that if an employer declines to use the test results to make promotions, the employer will thereby violate Title VII and the Equal Protection Clause; indeed, they argue that both Title VII and the Constitution require the certification of such results. As the district court properly concluded, neither claim survives summary judgment.

On Title VII, petitioners first assert that the statute mandates that the employer use the test results irrespective of whether doing so would entail a disparate-impact violation. Congress, however, has enacted

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[8] The seven named individuals are: Malcolm Webber and Zelma Tirado, the two members of the Civil Service Board who voted not to certify the results; Boise Kimber, a member of the board of fire commissioners who testified at the hearings; Thomas Ude, Jr., the Corporation Counsel at the time of the hearings; Mayor John DeStefano, Jr.; former Chief Administrative Officer Karen Dubois-Walton; and former Director of Personnel Tina Burgett.

[9] It therefore did not reach the question whether the individual respondents were entitled to qualified immunity.

an employment discrimination statute that prohibits disparate-impact discrimination as well as disparate treatment; petitioners' approach is irreconcilable with the statute and must fail. Part I.A.

Nor is there any merit to petitioners' fall-back position that by declining to make promotions based on a potentially flawed and discriminatory test, an employer violates Title VII unless the test actually violated Title VII. Rather, this Court's precedents recognize the competing obligations employers face and the related need for flexibility, and have repeatedly refused to require an actual violation before permitting an employer's voluntary action under Title VII. Part I.B.

Petitioners' second fall-back position is that the relevant standard for assessing when an employer may decline to base promotions on an employment test is whether there is a "strong basis" for concluding the use of the tests would violate Title VII. Petitioners, however, import this "strong basis" standard from the constitutional context; this Court has applied a different, lower standard for statutory claims such as this, and petitioners offer no reason to apply the higher standard here. Nonetheless, in light of the facts of this case, this dispute is largely of academic significance. In the present context—in which an employer seeks to avoid violating Title VII's disparate-impact provisions—the "strong basis" standard would require, at most, a prima facie case of a disparate-impact violation coupled with evidence substantiating the inference of discrimination, such as evidence suggesting that the tests were flawed or that there were equally valid, less-discriminatory alternatives. Part I.B.2.

Even assuming the Court applied the constitutional "strong basis" standard, it is easily met here. In par-

ticular, the Board heard evidence not only of a severe racial disparity, but also of serious questions as to whether the tests in fact properly identified the best candidates for the job, and of alternatives that further highlighted flaws in the tests and suggested less-discriminatory options that were at least as valid as the tests themselves. The Board's decision was thus grounded in a "strong basis." Nor are there any material disputed facts supporting petitioners' apparently distinct argument that the City was in fact motivated by an intent to discriminate. Part I.C.

Petitioners' final Title VII argument—that by declining to certify the test results the City violated 42 U.S.C. § 2000e-2(*l*), which makes it unlawful for employers to "alter the results of" employment tests—fails because declining to certify test results does not alter the scores. Part I.D.

As to petitioners' equal protection claim, their argument falters at the outset because strict scrutiny does not apply. This case does not involve racial classifications but rather race-neutral action—the non-certification applied to all candidates of all races. For strict scrutiny to apply in such circumstances, petitioners would need to establish the City's discriminatory intent. Petitioners' principal argument in this regard is that compliance with Title VII constitutes a discriminatory intent. This is contrary to the case law and would up-end several statutory schemes and government programs. Petitioners' alternate argument, that compliance was a pretext for an actual discriminatory purpose, lacks any support in the record that could create a material disputed fact necessary to survive summary judgment. Part II.A.

In any event, even if strict scrutiny applies, respondents' narrow, race-neutral action survives review. Compliance with Title VII's disparate-impact provisions constitutes a compelling interest given that the City readily satisfies the constitutional standard of "strong basis" to conclude the use of the tests would violate Title VII's disparate-impact provisions. Finally, the City's conduct, namely declining to certify tests that appeared to violate Title VII, is by definition narrowly tailored—the City did no more than avoid the violation. Part II.B.-C.

ARGUMENT

I. Declining To Certify The Test Results Did Not Violate Title VII

Congress's comprehensive statutory scheme guides the answer to the question of what employers may do when faced with a test with a severe adverse impact where additional evidence substantiates the inference of discrimination raised by the disparity: Consistent with its statutory obligations, the employer should simply decline to make use of the apparently discriminatory test.

A. Title VII Does Not Require, But Rather Forbids, Promotions Based On Employment Tests That Violate The Disparate-Impact Provisions

Petitioners assert (Br. 43, 46, 49) that Title VII requires employers to make promotions based on employment tests even where doing so would violate the statute's disparate-impact provisions. By arguing that compliance with Title VII itself violates Title VII, petitioners reject rather than apply the law Congress enacted.

In Title VII, Congress acted to prohibit both "disparate treatment" on the basis of race, gender, religion, or national origin, as well as employment practices that have a "disparate impact" and are not otherwise justified. Both disparate treatment and unjustified disparate impact are forms of discrimination. Disparate impact recognizes that "some employment practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination." *Watson* v. *Fort Worth Bank & Trust*, 487 U.S. 977, 987 (1988). Thus, where an employment practice has an adverse impact, it will violate Title VII unless (i) the practice is job-related and consistent with business necessity *and* (ii) there are no equally valid, less-discriminatory alternatives. 42 U.S.C. § 2000e-2(a), (k)(1)(A). In addition to offering a means to smoke out intentional discrimination,[10] this prohibition recognizes that an adverse impact serves as a red flag that a practice may be flawed, thereby not accurately selecting the most qualified candidates. Requiring use of less-discriminatory alternatives acknowledges that certain practices may appear neutral but nonetheless perpetuate discrimination. *See Griggs* v. *Duke Power Co.*, 401 U.S. 424, 432 (1971) (disparate impact seeks to root out employment practices that "operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability").

Petitioners' argument that compliance with disparate-impact provisions cannot justify forgoing promotions asks this Court to read disparate impact out of the

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[10] *See Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 425 (1975); *cf. International Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 339 n.20 (1977).

statute. By resting on the platitude that avoidance of unintentional discrimination cannot warrant intentional discrimination (Br. 49; *see also* Br. 66-67), this argument assumes that compliance with Title VII's disparate-impact provisions is itself discrimination. This assumption flouts Congress's intent—by ignoring the fact that Congress expressly outlawed disparate impact in order to combat discrimination, *see* Civil Rights Act of 1991, Pub. L. No. 102-166 § 2(2)-(3), 105 Stat. 1071, 1071; 42 U.S.C. § 2000e-2(a), (k)(1)(A), and by failing to read the provisions of Title VII in harmony, *United States* v. *Atlantic Research Corp.*, 127 S. Ct. 2331, 2336 (2007). With the disparate-impact and disparate-treatment prohibitions, "Congress did not intend to expose those who comply with [Title VII] to charges that they are violating the very statute they are seeking to implement." 29 C.F.R. § 1608.1(a).

Under petitioners' interpretation, an employer faced with a test or other employment practice with a disparate impact must nonetheless proceed with it even if it is not appropriate for the position or there are less-discriminatory alternatives. If the employer does not do so, it will be deemed to have intentionally discriminated against the group that fared better under the practice. This view transforms the adverse impact of the practice from a red flag that the practice may be unnecessary or discriminatory into a shield for those who fared well under the dubious practice, even if they did so precisely because of its defects.

Petitioners offer no relevant authority for this reading of Title VII, and the case law that addresses similar questions is contrary to their view. For example, in *Johnson* v. *Transportation Agency*, 480 U.S. 616, 626 (1987), this Court concluded that Title VII permits promotion decisions to be shaped by reliance on a gen-

der-conscious affirmative-action program that is consistent with congressional objectives under Title VII. Given that holding—and petitioners offer no reason to depart from it—it follows that promotion decisions can be shaped by the need to comply with Title VII itself.

B. A Strong Basis In Evidence Of A Disparate-Impact Violation Readily Suffices To Warrant Non-Certification Of Test Results

Given that Title VII does not require an employer to violate the disparate-impact provisions in order to comply with the statute, the next question is in what circumstances may an employer rely upon compliance with Title VII as a justification for declining to certify test results. The applicable standard must provide employers with sufficient flexibility to balance the competing interests at stake, namely the need to comply with the various provisions in Title VII so as to avoid discrimination and obtain the most-qualified workforce.

1. One approach petitioners espouse (Br. 43-44; *see also* Br. 33) is that an employer may act to comply with Title VII only where use of the tests for promotions would actually violate Title VII's disparate-impact provisions. But this Court has rejected the argument that there must be a Title VII violation in order to permit an employer to take remedial action under Title VII. *Johnson*, 480 U.S. at 630; *United Steelworkers of Am.* v. *Weber*, 443 U.S. 193, 208-209 (1979); *id.* at 213-215 (Blackmun, J., concurring). Petitioners point to nothing that undermines these decisions, and their rationale remains applicable here.[11]

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[11] Even where the Court has assessed when, consistent with the Equal Protection Clause, actions may be taken to remedy legal

Petitioners' approach, moreover, runs contrary to Congress's intent that voluntary compliance be "the preferred means of achieving the objectives of Title VII." *Local No. 93, Int'l Ass'n of Firefighters* v. *City of Cleveland*, 478 U.S. 501, 515 (1986); *see also* 29 C.F.R. § 1608.1(b) ("Congress strongly encouraged employers" to comply voluntarily); *see* U.S. Br. 12-13, 16-17.

Lacking support in the law, petitioners invoke the specter of quotas or racial balancing and assert the need to protect "bona fide merit systems." Br. 55; *see also* Br. 67. But requiring an actual disparate-impact violation does not advance these interests. As an initial matter, Congress has taken care to guard against such results, *see* 42 U.S.C. § 2000e-2(j), including by enacting a provision that prohibits race-norming of test scores, *id.* § 2000e-2(*l*). Thus, regardless of whether an employment test violates Title VII, there are protections against such conduct. In addition, for employers seeking to change an ongoing practice, petitioners' rule (of certain liability to one group or another) would have a chilling effect that may result in employers forgoing changes that will improve the hiring process.

Moreover, a standard that gives employers more flexibility entails less aggressive uses of race than what petitioners propose. Under petitioners' view, employers should certify test results even if they have substantial concerns that using the tests would violate Title VII. If, however, the tests are later judged to be discriminatory, an appropriate remedy will often neces-

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violations, it has not required proof of an actual violation. *See, e.g.*, *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986) (plurality opinion); *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 500 (1989).

sitate a messy unscrambling of decisions, with an aggressive use of race.[12] It is far preferable to permit employers to decline to certify apparently discriminatory tests even without conclusive evidence to that effect.

2. For these reasons, something less than an actual violation is sufficient to permit an employer to decline to use tests for promotion decisions.[13] Petitioners suggest that, if the actual violation is not needed, the standard is whether there is a "strong basis" on which to conclude that use of the tests would violate Title VII. Br. 49-50; *see also* Br. 56.

To support this view, petitioners rely on *Wygant* v. *Jackson Board of Education*, 476 U.S. 267, 277 (1986) (plurality opinion), and *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 500 (1989), two equal protection cases that used this standard in assessing when a government may resort to race-preferential policies as a remedy for past discrimination. Petitioners offer no explanation for why the threshold required to warrant an affirmative-action program involving set-asides in hiring or contracting ought to apply to the statutory question under Title VII of when an employer may decline to certify an employment test. Indeed, this Court's decisions in *Johnson* and *Weber* indicate that the constitutional "strong basis" standard does not apply in the Title VII context and that Title VII sets a

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[12] *See, e.g., Local No. 93*, 478 U.S. at 510-515 (affirming approval of consent decree requiring promotion of minority firefighters after judicial findings of past discrimination by city).

[13] *Accord* Cato Inst. et al. Amicus Br. 13 ("The employer need not be certain that the test establishes an adverse impact claim.").

lower standard. *See Johnson*, 480 U.S. at 627 n.6, 633 n.11; *see also Weber*, 443 U.S. at 213-215 (Blackmun, J., concurring).[14] In any event, the question whether a lower standard ought to apply is of largely academic significance in this case because even the higher "strong basis" standard is satisfied here.

The Court has made clear that the "strong basis" standard must give employers some flexibility so as to balance the competing objectives employers face in trying to comply with the Equal Protection Clause as well as with various statutory provisions. In *Wygant*, for example, there was the need to balance compliance with the Equal Protection Clause and the obligation to "eliminate" discrimination. 476 U.S. at 277 (plurality opinion). Were the Court to import this standard here, the same need to balance considerations would apply—the City is seeking to comply with both its disparate-treatment obligations and its disparate-impact obligations and faces potential liability on both fronts. *Cf. id.* at 291 (O'Connor, J., concurring in part and concurring in the judgment) (recognizing potential for liability on both sides). The "strong basis" standard reflects that difficult position by offering a bounded range of permissible conduct.

Assuming, *arguendo*, that the constitutional "strong basis" standard is applicable here, the framework for disparate-impact liability shapes the contours

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[14] *Johnson* and *Weber*, moreover, involved employer-initiated affirmative-action policies that were not required by Congress and that expressly sanctioned preferential hiring of minority and female employees. Here, the employer is merely declining to use employment tests in an effort to comply with Congress's mandate in Title VII.

of that standard. Where there is a prima facie case of discrimination,[15] the employment practice will not survive review if it is *either* not job-related and consistent with business necessity *or* there exists an equally valid, less-discriminatory alternative that still serves the employer's legitimate business needs. 42 U.S.C. § 2000e-2(a), (k)(1)(A). This Court has suggested that a "strong basis" is met where the "threshold conditions" for liability are present. *Bush* v. *Vera*, 517 U.S. 952, 978 (1996) (plurality opinion). This suggests that, in this case, a prima facie case that the tests violate Title VII's disparate-impact provisions may suffice. *See Croson*, 488 U.S. at 500. Accordingly, a "strong basis" is surely met where there is a prima facie case and the inference of discrimination is substantiated (though not necessarily proven) by evidence that raises concerns about test flaws or that suggests the availability of equally valid, less-discriminatory alternatives. Even under the higher, constitutional "strong basis" standard, petitioners' claim does not survive summary judgment.

C. In Light Of The Undisputed Facts, Affirmance Of The Grant Of Summary Judgment In Favor Of The City Is Warranted

The principal question of fact in this case is whether the relevant standard, whether "strong basis" or otherwise, has been met. This question arises as part of the *McDonnell Douglas* analytical framework governing petitioners' claim, specifically, as part of the question whether the City's proffered reason for its ac-

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[15] This may be established through statistical evidence that "the tests in question select applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants." *Albemarle*, 422 U.S. at 425.

tion—that it sought to comply with Title VII—is pretextual. The pretext question turns in part on whether the stated rationale is credible; assuming, *arguendo*, that the constitutional standard applies, the proffered reason for non-certification is credible if there is a "strong basis" to conclude that using the tests would have violated Title VII. In this case, in light of the ample evidence before the Board, this standard is easily met. Petitioners' alternate pretext argument is that the City was engaged in race politics and intended to harm whites in favor of African-Americans; this unsupported argument is insufficient for the claim to survive summary judgment.

1. The applicable framework

Petitioners' Title VII claim is that the City intentionally discriminated against them by declining to certify the test results. Such disparate-treatment claims are traditionally assessed under the *McDonnell Douglas* analytical framework. *See McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973).

Under the *McDonnell Douglas* framework, a plaintiff alleging a disparate-treatment claim must first establish a prima facie case of discrimination. *Texas Dep't of Cmty. Affairs* v. *Burdine*, 450 U.S. 248, 252-253 (1981). That shifts the burden to the employer to articulate a legitimate nondiscriminatory reason for its action. *McDonnell Douglas*, 411 U.S. at 802. This burden "is one of production, not persuasion; it 'can involve no credibility assessment.'" *Reeves* v. *Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 143 (2000) (quoting *St. Mary's Honor Ctr.* v. *Hicks*, 509 U.S. 502, 509 (1993)). The employer's nondiscriminatory reason rebuts the inference of discrimination and the employee must then prove "'discrimination *vel non*.'" *Id.* This

gives the plaintiff the "opportunity to demonstrate that the proffered reason was not the true reason for the employment decision." *Burdine*, 450 U.S. at 256.

In this case, the Court can easily dispense with the first two steps of the inquiry. The district court assumed the first step, that petitioners established a prima facie case of employment discrimination, and it is assumed, *arguendo*, by the City here. The City's proffered legitimate nondiscriminatory reason for noncertification is compliance with Title VII's disparate-impact provisions.[16] The City easily meets its burden of production: The record reflects, among other things, contemporaneous public statements and affidavits attesting to this rationale by the Board members who voted against certification (JA166-167; CAJA1605, 1611), as well as the basis for the rationale (*e.g.* JA44-48, 96-99). Critically, this evidence "need not persuade the court that [the City] was actually motivated by the proffered reasons," because the burden of proving the ultimate fact of discrimination "remains at all times with the plaintiff." *Burdine*, 450 U.S. at 254, 253; *Hicks*, 509 U.S. at 510-511.

The pretext component of the analysis in this case does not raise a genuine dispute of material fact, though petitioners argue otherwise (*e.g.*, Br. 54). A plaintiff may demonstrate pretext in two ways: (1) "by showing that the employer's proffered explanation is unworthy of credence" or (2) by showing "that a dis-

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[16] Any argument that compliance with Title VII is not a legitimate nondiscriminatory reason fails; Congress has determined that compliance with the disparate-impact provisions combats discrimination—it does not itself constitute discrimination. *See supra* Part I.A.

criminatory reason more likely motivated the employer[.]" *Burdine*, 450 U.S. at 256. "'[I]t is not enough,'" however, "'to *dis*[]believe the employer; the factfinder must *believe* the plaintiff's explanation of intentional discrimination.'" *Reeves*, 530 U.S. at 147 (emphasis in original). The burden of demonstrating pretext thus "merges with the ultimate burden of persuading the court that [the plaintiff] has been the victim of intentional discrimination." *Burdine*, 450 U.S. at 256.

The first option, concerning the credibility of the City's proffered reason, rests on the standard discussed in Part I.B., *supra*. Under the constitutional standard, the proffered reason for non-certification—compliance with Title VII's disparate-impact provisions—will be credible if there is a "strong basis" that the tests violated Title VII. Even under this high standard, there are no material disputed facts relevant to this inquiry into the "strong basis." Accordingly, even assuming *arguendo* the Court were to apply this standard, affirmance is appropriate. *See infra* Part I.C.2.

The second option for demonstrating pretext, establishing that the City was more likely motivated by a discriminatory reason, similarly does not require remand. The evidence to which petitioners point is largely irrelevant and creates no genuine material factual disputes. *See infra* Part I.C.3.

Notably, petitioners now assert that the *McDonnell Douglas* framework ought not apply and the burden ought to rest on the City to "demonstrate that the[] use of race was lawful." Br. 48. Specifically, petitioners assert that the City's reason for non-certification should be treated as "direct evidence of the use of race," which would place the burden on the defendant. *Id.* No court has passed on this argument, and the ef-

fort to place the burden on respondents is both unsupported by the case law[17] and futile: Regardless of the allocation of the burden of proof, there are no genuine disputes of material fact concerning whether there was a strong basis in evidence.

2. There are no material disputed facts as to the credibility of the City's reason for declining to certify the test results

A remand for consideration of the credibility of the City's stated rationale of complying with Title VII's disparate-impact provisions is unnecessary here; the evidence reflects no material disputed facts as to whether there was a strong basis to conclude that the use of the tests would violate Title VII. As an initial matter, the test results establish a prima facie case of

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[17] In *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111, 121 (1985), an ADEA case, the Court held that a job transfer benefit "discriminatory on its face" (expressly dependent on age) was "direct evidence of discrimination" that rendered *McDonnell Douglas* inapplicable. Here, petitioners argue (Br. 48) that the City's "use of race" is such "direct evidence." If petitioners' argument is that efforts to comply with Title VII are "direct evidence" of discrimination, it fails. This approach would up-end Title VII law, leaving plaintiffs with a distinct advantage (a win unless the employer can meet its heavy burden) where the employer was merely seeking to comply with federal law. Unsurprisingly, this Court has rejected comparable efforts to ease plaintiffs' burdens in Title VII cases. In *Johnson*, the employer cited an affirmative-action program to explain the promotion decision, but despite the use of "the sex of a qualified applicant," the Court expressly observed that *McDonnell Douglas* applied, and that it remained the plaintiff's burden to show pretext. 480 U.S. at 621, 626-627. Like all plaintiffs bringing disparate-treatment claims, it is up to petitioners to prove their case; if they cannot do so, the courts should not assume entitlement to relief.

discrimination, reflecting severe racial disparities. The inference of discrimination created by the prima facie case is substantiated by the evidence concerning the tests and alternative testing means. The Board heard ample evidence of problems in the test design that created substantial doubt that the tests were properly assessing the candidates for promotion, including problems relating to the content of the tests as well as the testing method. Compounding these concerns was evidence suggesting that alternatives would both better assess the candidates and have a less adverse impact. Even were the Court to apply the constitutional "strong basis" standard, these factors combine to produce a sufficiently strong basis for concluding that the tests violated Title VII's disparate-impact provisions.

a. A prima facie case of disparate-impact discrimination

Petitioners appear to concede (Br. 50-51) that had a plaintiff challenged the tests, the test results would have constituted prima facie evidence of a disparate-impact violation, and properly so, given the "evidence of adverse impact" (Br. 50; *see also* CAJA Add. 17, 30). The pass rates of black candidates on the lieutenant and captain exams were approximately one-half the corresponding rates for white candidates. JA225-226. This severe disparity is much lower than the 68% rate that constituted a prima facie case of discrimination in *Connecticut* v. *Teal*, 457 U.S. 440, 443 (1982), and the 80% rate (the 4/5ths rule) rule of thumb in the EEOC Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.4(D). And given the rankings and the Rule of Three, no African-Americans could be considered for any of the fifteen then-vacant lieutenant or captain positions. JA223-224; 29 C.F.R. § 1607.4(D); *cf.*

International Bhd. of Teamsters v. *United States*, 431 U.S. 324, 342 n.23 (prima facie case established where no African-Americans hired as line drivers—"the inexorable zero").

b. Evidence that the tests were not job-related or consistent with business necessity

Petitioners insist that the City's legitimate nondiscriminatory reason, compliance with Title VII, cannot be credible because the tests accurately measured the most qualified candidates and the City knew as much. *See* Br. 20, 35, 51-52, 54. Petitioners' unsupported assertions, however, neither undermine the ample evidence indicating that the exams were flawed nor call into question the Board's concerns in this regard.

After five days of hearings, one of the Board members voting against certification stated that, although he was originally going to vote to certify, he had "heard enough testimony here to give [him] great doubts about the test itself and the testing"; the other stated that she "fe[lt] that the process was flawed" and "the test was flawed." JA166-167.[18] These concerns were well grounded in the testimony before the Board.

The testimony raised substantial questions regarding whether the examinations accurately tested relevant knowledge. Evidence before the Board revealed that no one in New Haven had reviewed the tests (Pet.

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[18] Petitioners claim (Br. 15) that two City officials had no concerns about test flaws, but the evidence is unequivocal that the Board was interested in exam validity (*see, e.g.*, CAJA748) and that the two Board members who voted against certification were concerned about test flaws (JA166-167).

App. 508a-509a; CAJA982), and Hornick, an industrial psychologist, testified that by precluding internal review, the City had made it "inevitabl[e]" that the tests covered topics "that don't necessarily match up into the department." JA98.[19] Hornick's concerns were borne out by evidence before the Board of irrelevant or contradictory exam questions.[20]

Testimony also raised concerns that the examinations did not test the qualities necessary for a fire department captain or lieutenant but, rather, simply tested rote memorization skills. Indeed, then-Corporation Counsel Ude told the Board that questions on the tests were similar to those in firefighter promotional exams in New Jersey that a court had rejected as being "more probative of the test-taker's ability to recall what was in a particular text than their firefighting

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[19] The sole person to review the tests was a fire officer from outside Atlanta. Pet. App. 509a. Not only is the relevance of this review questionable, but standard practice requires review of an exam by multiple experts. *See* Livingston & Zieky, *Passing Scores: A Manual for Setting Standards of Performance on Educational and Occupational Tests* 16 (Educ. Testing Serv. 1982); *see generally* Brannick et al., *Job and Work Analysis* 276 (2d ed. 2007). Legel later testified that internal review was "[s]tandard practice." Pet. App. 635a; *see also* Ployhart et al., *Staffing Organizations: Contemporary Practice and Theory* 315 (3d ed. 2006) ("content validation of tests requires informed judgments from people who know about the job").

[20] For example, one question asked whether to approach a particular emergency from uptown or downtown, even though such distinctions are meaningless in New Haven. JA48. For another question, the correct response for New Haven practice was not offered as an answer. JA44-45.

or supervisory abilities." JA137-138; JA148.[21] Hornick likewise raised concerns about the relevance for firefighter promotions of multiple-choice exams, which test rote memorization. JA102-103.

The evidence that has come to light in this litigation offers nothing to undermine the grounds to conclude the tests were flawed—rather, the evidence only reinforces that there was ample cause for concern. To start with, IOS did not design the tests so that 70, the passing scores, actually reflected minimal competence for promotion. Legel explained that IOS skipped the "very critical process"—the Angoff workshop—that determines proper cut-off scores. Pet. App. 698a.[22] Instead, IOS designed "difficult" written tests, which

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[21] *See Vulcan Pioneers, Inc.* v. *New Jersey Dep't of Civil Serv.*, 625 F. Supp. 527, 539-540 (D.N.J. 1985), *aff'd*, 832 F.2d 811 (3d Cir. 1987); *see also, e.g., Firefighters Inst. for Racial Equality* v. *City of St. Louis*, 616 F.2d 350, 359 (8th Cir. 1980).

[22] While petitioners assert (Br. 7) that the "cutoff ... score was calibrated to equate with minimal competence," it is undisputed that IOS did not perform an Angoff workshop (Pet. App. 697a-698a). While IOS claimed that it did not perform this step because of New Haven's concerns for secrecy (Pet. App. 697a-698a), the reason is irrelevant to the question whether the tests were properly designed. *Cf. Isabel* v. *City of Memphis*, 404 F.3d 404, 413 (6th Cir. 2005) (affirming rejection of test where district court found "'the cutoff score was nothing more than an arbitrary decision and did not measure minimal qualifications'"). Having failed to conduct an Angoff workshop, there is no evidence that IOS took any other steps to calibrate the scores. *See* Pet. App. 338a (IOS letter stating "there is nothing further we can add concerning the development and administration of the tests"); Pet. App. 330a (explaining information a technical report typically contains, including cut-off score calibration process, but not claiming IOS calibrated the scores here).

necessarily screened out large numbers of candidates. Pet. App. 685a. This Court has disapproved of this very approach. *See McDonnell Douglas*, 411 U.S. at 806 (suggesting that "a testing device which overstates what is necessary for competent performance" would be improper); 29 C.F.R. § 1607.5(H).

Moreover, in his testimony, Legel never suggested that the tests were calibrated closely enough to be used to rank-order candidates, which requires that each higher score reflect better anticipated job performance.[23] The precision of the scores was critically important because of the intervening state court decision interpreting the Rule of Three so as to prevent the City from rounding to the nearest integer (CAJA1706-1720), which meant that New Haven would be promoting based on score differentials of a tenth, or even a hundredth, of a point.

Petitioners do not suggest that these concerns about flaws are unfounded except insofar as they insist that the City knew "or willfully endeavored to avoid knowing" that the tests were valid. Br. 51. This argument rests on their claim that the test designer "stood ready" to provide, and the City refused to receive, a "technical report" that would have proved the tests were job-related. Br. 51-52. This argument is a red herring.

The "technical report" or "validation study" would not, as petitioners' arguments (Br. 51-52) suggest, ac-

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[23] *See* 29 C.F.R. § 1607.15(C)(7) (employer should "specify the evidence showing that a higher score on the selection procedure is likely to result in better job performance"); Am. Psychological Ass'n, *Standards for Educational and Psychological Testing* 29-31 (1999) (tests used for ranking require higher levels of precision).

tually prove whether the tests were "valid" in the sense of being job-related to properly assess the candidates for the promotions. Rather, as IOS itself has made clear, it is a descriptive document that lays out the steps taken in the process of designing a test. IOS explained this report is not in itself "a necessary document" because it simply summarizes the test development process. Pet. App. 596a-597a; *see also* Pet. App. 338a (IOS letter stating "there is nothing further we can add concerning the development and administration of the tests[]"). The report would not have proved whether the tests themselves were valid or flawed and, in turn and contrary to petitioners' suggestion (Br. 11, 51-52), would not have protected the City in any future litigation, as the case law makes clear. *See, e.g., Firefighters Inst. for Racial Equality* v. *City of St. Louis*, 616 F.2d 350, 357 (8th Cir. 1980) (St. Louis "attempted to establish the validity of the examination" and submitted a validation study, but "the examination is not content valid").

c. Evidence of equally valid, less-discriminatory alternatives

The evidence before the Board of various less-discriminatory alternatives further supported the inference from the severe adverse impact. Petitioners cite nothing that suggests otherwise. The proposed alternatives included different ways to use the same type of tests as well as different testing regimes entirely.

First, the Board heard evidence of an alternative that would weight written and oral portions of the exam differently. *See* JA65-66, 150. The written component tested for technical knowledge, and the oral component tested for skills. Pet. App. 648a-650a. The relative weightings were arbitrary: They did not re-

flect any assessment of the relative importance of the two components for job performance, but simply came from a contract with the union. Pet. App. 606a-607a. Because the City's weightings were arbitrary, a different weighting would have been at least as valid. Testimony indicated that neighboring Bridgeport's tests use different weightings and are less discriminatory. JA65-66. Based on the raw test scores (Pet. App. 437a-438a), if the tests were weighted 70%/30% oral/written, then two African-Americans would have been considered for lieutenant positions and one for a captain position.

Second, promoting under the City's previous interpretation of the Rule of Three would have been a less-discriminatory alternative. Pet. App. 443a-444a. As explained, *supra* pp. 4-5, under the former interpretation (the City's interpretation at the time the tests were designed and administered), the Rule of Three would have permitted rounding scores to the nearest integer and promoting from the top "ranks," yielding additional candidates available for each promotion slot. Under this option, candidates eligible for the open slots for both positions would have included four African-Americans and one additional Hispanic candidate. *See* Pet. App. 437a-438a. That a state court permanently enjoined the City from employing this interpretation as a matter of municipal law (Pet. App. 443a-444a) does not eliminate this option as an alternative or otherwise immunize the City from Title VII liability, 42 U.S.C. § 2000e-7.[24]

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[24] *See Brown* v. *City of Chicago*, 8 F. Supp. 2d 1095, 1111-1112 (N.D. Ill. 1998) (method city explored was available alternative,

This alternative of construing the Rule of Three to permit rounding is a form of "banding" of scores; banding is rooted in the fact that every exam has some margin of error, *i.e.*, an amount by which a candidate's score might fluctuate independent of the candidate's true quality.[25] As Judge Posner has explained, banding is "a universal and normally an unquestioned method of simplifying scoring by eliminating meaningless gradations" between two candidates whose scores differ by less than the margin of error. *Chicago Firefighters Local 2* v. *City of Chicago*, 249 F.3d 649, 656 (7th Cir. 2001); *see also, e.g.*, *Biondo* v. *City of Chicago*, 382 F.3d 680, 684 (7th Cir. 2004) (banding properly "respect[s] the limits of [an] exam's accuracy while avoiding any resort to race or ethnicity"). Petitioners even stated that "alternatives such as banding of candidates within a defined score spread are reasonable." Pet. CA Reply 9.[26]

The Board also heard evidence of alternative testing approaches, including situation-judgment tests and assessment centers. JA102-103. Hornick informed the Board that situation-judgment exams evaluate candidates on "the ability to apply their knowledge as opposed to [the ability to] memorize[.]" *Id.* Situation-

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even though state law prohibited it), *aff'd sub nom. Bryant* v. *City of Chicago*, 200 F.3d 1092 (7th Cir. 2000).

[25] Am. Psychological Ass'n, *Standards for Educational and Psychological Testing* 25 (1999).

[26] Score banding does not violate the prohibition on adjusting scores in Section 2000e-2(*l*); treating scores within a certain range (for instance, a range that covers the margin of error) as functionally equivalent does not implicate this provision as the alteration affects all races equally. *Local 2*, 249 F.3d at 655-656.

judgment tests (a type of written test) are viewed as "good predictors of job performance" that regularly produce much less adverse impact than job-knowledge tests. McDaniel et al., *Use of Situational Judgment Tests to Predict Job Performance*, 86 J. Applied Psychol. 730, 736 (2001). Assessment centers evaluate actual behavior in typical job tasks, and when properly developed "show considerable predictive validity." Int'l Task Force on Assessment Ctr. Guidelines, *Guidelines and Ethical Considerations for Assessment Center Operations* 2, 8 (2000).

Petitioners do not counter any of this evidence and, in fact, evidence in this litigation only confirms that other less-discriminatory alternatives were available. For example, the City could have required minimum competency on both oral and written exams, especially since they were testing for different traits. Instead, the City's approach permitted a candidate to compensate for a failing score on one component with a high score on the other, a rule that favored two white candidates within the ten eligible for promotion to lieutenant who had failed the oral portions of the exam. Pet. App. 437a.[27] Based on the raw test scores, the alternative requirement of passing scores on each component would have allowed the City to consider one African-American for a lieutenant promotion. *See id.*

* * *

[27] *Cf. Gulino* v. *New York State Educ. Dep't*, 460 F.3d 361, 387 (2d Cir. 2006) (validity of one component could not justify a multi-component test when a candidate could compensate for failing one part with a high score on another).

In this case, the evidence yields no material disputed facts concerning the credibility of the Board's reason for declining to certify the test results, namely the need to comply with Title VII. The inferences of discrimination to be drawn from the extreme adverse impact were buttressed by evidence of flaws in the tests as well as less-discriminatory and equally, if not more, valid alternatives. Taken together, these considerations more than suffice to permit the City's approach, even if the Court applies the constitutional "strong basis" standard. That the tests had their supporters does not cast doubt on the credibility of the Board's conclusion or undermine the "strong basis" in light of the substantial evidence that supported the inference of discrimination.

3. Petitioners' assertion that the City was motivated by discriminatory intent cannot survive summary judgment

Unable to assail the credibility of the legitimate nondiscriminatory reason of compliance with Title VII, petitioners contend (*see, e.g.*, Br. 54) that the City was motivated by a discriminatory intent—namely, that it sought to discriminate against whites in favor of African-Americans (notwithstanding the fact that whites outnumber African-Americans in New Haven).[28] The evidence to which petitioners point offers nothing that could "lead a rational trier of fact to find for" petition-

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[28] According to the 2000 census, 43.5% of the population of New Haven was white and 37.4% was black. U.S. Census Bureau, State & County, QuickFacts, New Haven, Connecticut, *at* http://quickfacts.census.gov/qfd/states/09/0952000.html (last visited Mar. 18, 2009).

ers. *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

Petitioners' arguments center around the view that race politics motivated the decision not to use the test scores, and the race politics arguments in turn focus on respondent Boise Kimber, an African-American minister. *See* Br. 11, 14, 17, 27 n.13, 30-31. Petitioners principally point to Kimber's public testimony before the Board[29]—even though Kimber was only one of numerous speakers, including petitioner Ricci himself as well as counsel for petitioners. Petitioners' counsel strongly urged the Board to certify, threatening legal action. CAJA814-817. Petitioners offer no basis to conclude that Board members were influenced (improperly or otherwise) by Kimber, petitioners' counsel, or anyone else.[30]

The arguments concerning Kimber also ignore the relevant decision-makers regarding test certification,[31] namely the members of the Civil Service Board. *See*

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[29] For ease of reference, petitioners cite the following to support their statements concerning Kimber: Pet. App. 490a-498a, 780a-781a, 812a-816a, 857a-858a, 882a-883a; CAJA556-559. Additional relevant testimony appears at: CAJA768-771, 798, 873-897, 904-905.

[30] *Cf. City of Cuyahoga Falls* v. *Buckeye Cmty. Hope Found.*, 538 U.S. 188, 195-198 (2003) (failure to show that allegedly discriminatory motives of voters could be attributed to city officials defeated equal protection claim against city officials on summary judgment).

[31] *Cf. City of Mobile* v. *Bolden*, 446 U.S. 55, 74 n.20 (1980) ("To the extent that the inquiry should properly focus on the state legislature, ... the actions of unrelated governmental officials would be, of course, of questionable relevance.").

supra p. 6. Petitioners have not pointed to any evidence suggesting that any Board member was motivated by an intent to discriminate and the contemporaneous statements of the Board members opposing certification are to the contrary. Moreover, there is no evidence of any improper contact between Board members and City officials or that the Board's investigation was not independent.[32] It is revealing that, despite the fact that their allegations necessarily center around the Board members voting against certification, petitioners did not even seek to depose them.[33]

Petitioners attempt to create an inference of discriminatory intent by declaring that "New Haven and its officials have a documented history of violating Connecticut law to give minorities advantageous treatment in public employment." Br. 29. To the contrary, the City Fire Department's litigation history

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[32] Petitioners allege that City officials kept information from the Board, including a letter from IOS. Br. 11-12. Yet the record suggests that the City in fact provided the letter to the Board (CAJA1260) and, moreover, the record reveals that the City facilitated IOS's testimony before the Board (CAJA501) and that IOS testified in detail regarding the topics outlined in the letter. *Compare* Pet. App. 501a-536a (IOS testimony) *with* Pet. App. 337a-339a (IOS letter). Likewise, no discriminatory intent can be inferred from the fact that the City did not request a technical report, for the report would have simply described the process, and therefore, was not a "necessary document" (Pet. App. 596a-597a). *See supra* pp. 31-32. Other allegations that City officials kept information from the Board are similarly without merit. *Compare* Br. 14 (asserting the fire chief and assistant chief were "[n]ot allowed to speak" to the Board) *with* Pet. App. 850a; CAJA1342.

[33] Indeed, Webber and Tirado filed affidavits in this litigation stating that their votes were due to concerns that certifying would result in violating federal civil rights laws. CAJA1604, 1610.

demonstrates discrimination against African-Americans, not whites. *See Broadnax* v. *City of New Haven*, 851 A.2d 1113, 1138-1139 (Conn. 2004) (reversing dismissal of claim of intentional discrimination against African-American firefighters), *on remand*, No. CV980412193S, 2008 WL 590818, at *1-*2 (Conn. Super. Feb. 19, 2008) (unpublished) (awarding front pay and noting earlier award of back pay after June 2005 jury verdict on equal protection claim). Indeed, none of the cases that petitioners cite (Br. 5-6, 29) for the allegation that the City has favored minorities included any finding of "advantageous treatment" of "minorities."[34]

Given that petitioners have failed to identify any relevant evidence of race politics or discriminatory motives, there is no genuine factual dispute on the matter and no reason to proceed to trial. *See Celotex Corp.* v. *Catrett*, 477 U.S. 317, 323-324 (1986) ("One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses[.]").

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[34] Three of the cited opinions did not even mention the possibility of discrimination. *Hurley* v. *City of New Haven*, No. 054009317, 2006 WL 1609974 (Conn. Super. May 23, 2006) (unpublished); *Bombalicki* v. *Pastore*, No. 378772, 2001 WL 267617 (Conn. Super. Feb. 28, 2001) (unpublished); *Henry* v. *Civil Serv. Comm'n*, No. 411287, 2001 WL 862658 (Conn. Super. July 3, 2001) (unpublished). In the fourth case (filed by petitioners' counsel), the court did not consider the discrimination allegations. *Kelly* v. *City of New Haven*, 881 A.2d 978, 986 n.12 (Conn. 2005).

D. 42 U.S.C. § 2000e-2(*l*) Does Not Prohibit A Decision To Decline To Certify Test Results

Finally, petitioners argue (Br. 62-66) that the non-certification of the exams violates 42 U.S.C. § 2000e-2(*l*), which makes it unlawful for an employer "to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race[.]" This Court should reject this strained reading of Section 2000e-2(*l*).[35]

To start with, the plain language of the statute, which forbids "alter[ing] the results of ... tests," does not prohibit declining to use a test. *See* U.S. Br. 20 (defining "alter"). Section 2000e-2(*l*), moreover, is entitled "Prohibition of discriminatory *use* of test scores," 42 U.S.C. § 2000e-2(*l*) (emphasis added), and "otherwise alter[ing]" must be read in conjunction with the two prohibitions preceding it—those of "adjusting the scores of" and "using different cutoff scores for" tests. The "otherwise altering" prohibition thus applies only to test scores that are being used. Indeed, Congress expressed that these prohibitions are triggered only "once a test is determined to be employment related." 137 Cong. Rec. 29,047 (1991).

II. Declining To Certify The Test Results Did Not Violate The Equal Protection Clause

The equal protection question in this case addresses what a public employer may do when faced with tests that appear to violate Title VII's disparate-impact provisions. Here, the City did not adopt af-

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[35] The lower courts did not address this argument—which was not squarely presented below—and thus offered no interpretation of this provision.

firmative-action policies, engage in racially proportional promotions, or adjust test scores to benefit minority candidates. Rather, it merely declined to use the tests given substantiated concerns that such use would violate the disparate-impact provisions of Title VII. This approach to tests that raise red flags about whether candidates are being properly evaluated for promotion is precisely the sort of race-neutral, narrow conduct directed towards compliance with Congress's mandate and assuring a fair and merit-based selection process that the Constitution permits.

A. The Non-Certification Of The Test Results Did Not Trigger Strict Scrutiny

Petitioners appear to argue that strict scrutiny applies for two reasons: first, because the non-certification is allegedly a racial classification such as those in cases like *Adarand Constructors, Inc.* v. *Peña*, 515 U.S. 200 (1995), and *Croson*, 488 U.S. 469, and second, because respondents purportedly acted with discriminatory intent. The first argument fails on its face; the second does not survive review at summary judgment.

1. Declining to certify the test results did not entail racial classifications triggering strict scrutiny

Petitioners suggest (Br. 21-27) that this case involves racial classifications such as occurred in cases like *Parents Involved in Community Schools* v. *Seattle School District No. 1*, 127 S. Ct. 2738 (2007), *Adarand*, and *Croson*. These cases, however, all involved the allocation of opportunities that expressly depended on the race of the individual. *Parents Involved*, 127 S. Ct. at 2746; *Adarand*, 515 U.S. at 213; *Croson*, 488 U.S. at 477-478.

The government action at issue here, which did not treat individuals differently according to race, is of a fundamentally different character. The promotions petitioners seek have not been awarded on the basis of a racial quota or pursuant to an affirmative-action plan, nor will they be. Rather, all that has happened is that the test results went uncertified for all candidates, those who passed and those who did not, where both categories included white and black individuals. Pet. App. 429a-436a; JA227. This case thus lacks the hallmark of express racial classifications—"state-mandated racial label[s]" that determine the "allocation of benefits and burdens." *Parents Involved*, 127 S. Ct. at 2797 (Kennedy, J., concurring in part and concurring in the judgment). Indeed, petitioners have repeatedly noted that, under these tests, African-Americans as well as Hispanics would have been available to be promoted. *See, e.g.*, Br. 61-62 n.27 (asserting that "the city denied 5 highly qualified minorities well-deserved promotions—to their dismay, *see* Pet. App. 420a-422a" as a result of its decision not to use the tests); Br. 26 & n.11. The non-certification "neither says nor implies that persons are to be treated differently on account of their race." *Crawford* v. *Board of Educ.*, 458 U.S. 527, 537 (1982).

That the higher-scoring group was disproportionately white does not render non-certification a racial classification; it simply means that the race-neutral conduct had differential *effects*, and such effects can trigger strict scrutiny only if accompanied by discriminatory intent. *Washington* v. *Davis*, 426 U.S. 229, 242 (1976); *see infra* Part II.A.2. Any such argument, moreover, presumes a critical factor that is absent here—that the tests properly assessed candidates for promotion. If the tests did not do so—and, as discussed

above, *see supra* Part I.C., there is at least a strong basis to conclude they did not—then any argument about disproportionate effects fails because the white candidates with superior scores should not have obtained those scores in the first place. *Cf. Croson*, 488 U.S. at 526 (Scalia, J., concurring in the judgment) (a "State may ... giv[e] to a previously rejected black applicant the job that, by reason of discrimination, had been awarded to a white applicant, even if this means terminating the latter's employment. In such a context, the white job-holder is not being selected for disadvantageous treatment because of his race, but because he was wrongfully awarded a job to which another is entitled."); *see also Billish* v. *City of Chicago*, 989 F.2d 890, 895 (7th Cir. 1993) (en banc) (Posner, J.) (Plaintiffs "have no vested rights in their position on an eligibility list compiled on the basis of an examination that may have been biased in favor of whites").

In an effort to suggest that racial classifications were nonetheless at issue, petitioners repeatedly refer to "race-coded lists," stating, for example: "Using race-coded lists to determine whether to certify, the city and its officials acted on raw racial labels and distributions." Br. 23. But the lists did not lead to differential treatment, which is what raises the constitutional question. *Croson*, 488 U.S. at 493 (plurality opinion) (racial classification worked to deny to non-minorities opportunities to compete for contracts).[36] Rather, the lists were just

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[36] Petitioners' suggestion (Br. 25) that *Croson* is comparable because there had been "across-the-board cancellation of bids" ignores the central issue in that case, which was not the cancellation of bids, but what petitioners acknowledge (*id.*) was a "minority-subcontracting set-aside." Here, there is no comparable program; rather, petitioners challenge the non-certification standing alone.

lists, the mere existence of which is required under EEOC guidelines concerning records of racial impact of employment practices. 29 C.F.R. § 1607.15(A); *see also, e.g.*, *Parents Involved*, 127 S. Ct. at 2792 (Kennedy, J., concurring in part and concurring in the judgment) (it would be permissible to "track[] enrollments, performance, and other statistics by race"); *Shaw* v. *Hunt*, 517 U.S. 899, 925-926 (1996) (*Shaw II*) (Stevens, J., dissenting) (strict scrutiny ought not apply to decision to require race disclosures on the census).

2. Strict scrutiny is not warranted on the theory that respondents acted with discriminatory intent

This Court has found that certain race-neutral conduct may nonetheless trigger strict scrutiny. However, to avoid the harm that would flow from subjecting every government decision to strict scrutiny, facially neutral conduct is entitled to "judicial deference" unless the plaintiff demonstrates that a "discriminatory purpose has been a motivating factor in the decision." *Village of Arlington Heights* v. *Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 265-266 (1977). Apparently invoking this theory, petitioners contend (Br. 23) that all of the reasons provided by respondents are "grounded on the race of the successful candidates" and thus respondents' conduct triggers strict scrutiny. Specifically, they contend that strict scrutiny applies whether the motivation was Title VII compliance or a refusal to promote white candidates because they were white. Br. 23-26. Neither argument warrants the application of strict scrutiny in this case.

a. The intent to comply with Title VII

Petitioners' argument (Br. 24) that an intent to comply with Title VII's disparate-impact provisions is a "race-related reason[]" that warrants strict scrutiny is contrary to this Court's cases and threatens many long-accepted practices.

As a general matter, this Court's equal protection cases favor race-neutral action even when geared towards ends that relate to race, whether they be diversity in higher education or improved economic opportunities for minorities. *See Grutter* v. *Bollinger*, 539 U.S. 306, 339 (2003) (narrow tailoring requires, *inter alia*, "serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks"); *Croson*, 488 U.S. at 509 ("Even in the absence of evidence of discrimination, the city has at its disposal a whole array of race-neutral devices to increase the accessibility of city contracting opportunities to small entrepreneurs of all races.").

Several Justices have suggested more explicitly that conduct that is race-neutral but nonetheless taken for what petitioners would term a "race-related reason" would not trigger strict scrutiny. In the context of elementary schools, for example, Justice Kennedy suggested that school officials concerned about "student-body compositions ... are free to devise race-conscious measures to address the problem in a general way and without treating each student in different fashion solely on the basis of a systematic, individual typing by race." *Parents Involved*, 127 S. Ct. at 2792 (Kennedy, J., concurring in part and concurring in the judgment). Proposing approaches that are clearly "race-related" under petitioners' approach, such as "strategic site selection of new schools; ... allocating resources for special pro-

grams; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race," Justice Kennedy stated: "These mechanisms are race conscious but do not lead to different treatment based on a classification that tells each student he or she is to be defined by race, so it is unlikely any of them would demand strict scrutiny to be found permissible." *Id.*

Similarly, Justice Thomas's discussion of decisions made with diversity objectives in mind suggests that such decisions would probably not be subjected to strict scrutiny. For example, "the adoption of different admissions methods" by public universities in order to increase the diversity of their student-bodies, "such as accepting all students who meet minimum qualifications," likely would not be subject to strict scrutiny. *See Grutter*, 539 U.S. at 361 (Thomas, J., concurring in part and dissenting in part). Justice Thomas also explained that when schools use tests like the LSAT despite "racially skewed results," if they "then attempt to 'correct' for black underperformance," that will trigger strict scrutiny because "[h]aving decided to use the LSAT, [schools] must accept the constitutional burdens that come with this decision." *Id.* at 370. The suggestion is that a school may freely decide not to use the LSAT in the first place given the "poor performance of blacks." *Id.* at 369. Justice Scalia has supported comparable conduct: race-neutral programs with "a disproportionately beneficial impact on blacks," such as a "race-neutral remedial program aimed at the disadvantaged *as such*," are "in accord with the letter and the spirit of our Constitution." *Croson*, 488 U.S. at 528 (Scalia, J., concurring in the judgment) (emphasis in original).

These cases demonstrate that in cases such as *Arlington Heights*, "discriminatory purpose" did not extend to *any* consideration of race. And if race-neutral action may be taken, without triggering strict scrutiny, with the goal of achieving diversity or providing improved opportunities to certain groups—goals that state or local actors arrive at *sua sponte*—then surely efforts to comply with a mandate set by Congress will not be deemed "discriminatory." *See infra* Part II.B.

Not only do petitioners offer no relevant authority in support of their approach, but its far-reaching consequences also undermine its viability. In the employment context alone, any employer's decision to switch from one race-neutral promotion system to another would be treated as a racial classification subject to strict scrutiny if it were adopted even in part to avoid the disparate effects of the prior system. A State's decision to eliminate a veterans' preference, for example, would be treated as a gender-based classification if the elimination were motivated by a desire to eliminate the adverse effect the preference had on women.

Beyond Title VII, the race-neutral practices with race-related goals approved of above would be cast into doubt, as would be race-neutral actions taken to comply with such laws as the Voting Rights Act, the Fair Housing Act's prohibition on discrimination, 42 U.S.C. § 3604(b), and Title VI's regulations prohibiting the adoption of policies that have "the effect of ... substantially impairing accomplishment of the objectives of the program as respects individuals of a particular race, color, or national origin," 28 C.F.R. § 42.104(b)(2). Numerous other contexts where race is taken into account would also be at risk. For example, "a provision of the No Child Left Behind Act ... requires States to set measurable objectives to track the achievement of stu-

dents from major racial and ethnic groups." *Parents Involved*, 127 S. Ct. at 2766 (citing 20 U.S.C. § 6311(b)(2)(C)(v)). If a State were to act on this data—by, for example, increasing investment in Head Start—that also would be subject to strict scrutiny.[37] Even the census, which has collected data on race since 1790, *see* 1 Stat. 99, 101-102 (1790), and is used for purposes of determining grant benefits, local planning, legislation, and other purposes, would be constitutionally suspect.

b. The purported intent "not to promote white firefighters precisely because they were white"

Petitioners' alternate theory of intent is that respondents' aim was racial balancing and thus they refused to certify the tests because they did not want to promote white firefighters because they were white. Br. 25-26. For the reasons explained above, however, this argument that compliance with Title VII was a pretext for discrimination against whites cannot survive summary judgment. As discussed, petitioners fail

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[37] Petitioners' theory would similarly require strict scrutiny to be applied to race-neutral action taken to try to remedy widespread disparities in health. *See, e.g.*, Roemer, *Inner-City Mammography Programs Aim to Make Breast Cancer "A Visible Disease,"* 92 J. Nat'l Cancer Inst. 444, 445 (2000) (describing a "federally and state-funded program" of "breast and cervical cancer screening" in Harlem); *see also* Pub. L. No. 106-525, § 301(b), 114 Stat. 2495, 2507 (2000) ("[T]he National Academy of Sciences shall prepare and submit ... a report that—(1) identifies the data needed to support efforts to evaluate the effects of socioeconomic status, race and ethnicity on access to health care[.]"); *see generally* Burchard et al., *The Importance of Race and Ethnic Background in Biomedical Research and Clinical Practice*, 348 New Eng. J. Med. 1170 (2003).

to focus on the actual decision-makers, *see, e.g.*, *City of Mobile* v. *Bolden*, 446 U.S. 55, 74 n.20 (1980). Petitioners' other allegations lack support in the record and do not give rise to a genuine material factual dispute as to the question of "discriminatory intent." *See supra* Part I.C.3.

B. Respondents Had A Compelling Interest In Complying With Title VII's Disparate-Impact Provisions

Even if this Court determines that strict scrutiny applies to the Board's conduct in declining to certify the tests for all candidates, it should conclude that respondents have demonstrated a compelling interest in compliance with Title VII. Petitioners argue (Br. 28-29) that compliance with Title VII can never provide a compelling interest, and (Br. 33) that even if it does, an employer must prove a violation to invoke this interest. Contrary to petitioners' view and consistent with this Court's case law, compliance with Title VII's disparate-impact provisions may provide a compelling interest where the employer has a "strong basis in evidence" to conclude that use of a test would violate Title VII. By not requiring employers to prove a violation against themselves, this standard creates a zone of permissible conduct that provides the necessary, but still bounded, flexibility to the employer. It also avoids imposing on society the burden of a zero-sum approach to discrimination that, pitting race against race, converts day-to-day government decision-making into presumptive constitutional violations.

1. Compliance with Title VII's disparate-impact provisions can be a compelling interest

Petitioners seek a holding that compliance with Title VII's disparate-impact provisions can never be a

compelling interest. Br. 28-33. Contrary to petitioners' view, compliance with Title VII's disparate-impact provisions may be a compelling interest given the long-standing approval by this Court and Congress of these provisions and the destabilizing effect on the enforcement of federal law of the contrary view.

That compliance with a federal statute may serve as a compelling interest is entirely sensible. If that were not the case, "then a State could be placed in the impossible position of having to choose between compliance with [the statute] and compliance with the Equal Protection Clause." *League of United Latin American Citizens (LULAC)* v. *Perry*, 548 U.S. 399, 518 (2006) (Scalia, J., concurring in the judgment in part and dissenting in part). This problem of hamstringing employers is not solved by petitioners' suggestion (Br. 29) that the disparate-impact provisions must bend to the Equal Protection Clause because that clause is part of the Constitution. This merely begs the question whether the compliance with the statute—like any other goal that is offered as a compelling interest—may justify (when narrowly tailored) the kind of treatment that the Equal Protection Clause otherwise guards against.

Both this Court and Congress have approved of disparate-impact liability, cementing its legitimacy over almost forty years. Before disparate impact was expressly addressed as such in Title VII, *Griggs*, 401 U.S. at 431, interpreted Title VII to "proscribe[] ... practices that are fair in form, but discriminatory in operation." This interpretation has been "repeatedly affirmed." *Watson*, 487 U.S. at 988. Congress, too, has approved liability for disparate-impact discrimination. After noting *Griggs* with approval in the Committee Reports on the 1972 amendments to Title VII, *see* S.

Rep. No. 92-415, at 5 & n.1, 14 (1971); H.R. Rep. No. 92-238, at 8 (1971), Congress codified *Griggs*, "provid[ing] statutory guidelines" for disparate-impact claims, Civil Rights Act of 1991, Pub. L. No. 102-166, § 3(3), 105 Stat. 1071, 1071; *see also id.* §§ 104-105, 105 Stat. at 1074-1075.

This treatment by the Court and Congress only reinforces the conclusion that States, consistent with the Supremacy Clause, are obligated to comply with Title VII, including the disparate-impact provisions. Especially in light of this history, "it would be irresponsible for a State to disregard" Title VII's disparate-impact provisions. *Vera*, 517 U.S. at 991 (O'Connor, J., concurring) (addressing the question of compliance with Section 2 of the Voting Rights Act as a compelling interest in light of the Court's implicit approval of Section 2). Indeed, that the compelling interest relied upon here comes from Congress and this Court, rather than from a State, city, public educational institution, or the like is important. *See Croson*, 488 U.S. at 521-525 (Scalia, J., concurring in the judgment) (citing concerns about "'plan[s] of oppression'" devised by "'smaller'" political units, as compared to "'extend[ed] sphere[s]'" where "'it [is] less probable that a majority of the whole will have a common motive to invade the rights of other citizens'" (quoting James Madison, The Federalist No. 10, at 82-84 (C. Rossiter ed. 1961))).

Petitioners appear to argue (Br. 28-29) that compliance with Title VII's disparate-impact standard cannot be a compelling interest because "the Equal Protection Clause forbids only intentional racial discrimination in governmental employment, not mere disparate impacts." Br. 29 (citing *Davis*, 426 U.S. at 242). But this logic falls short: That the Equal Protection Clause does not prohibit unintentional discrimination does not mean

that avoiding unintentional discrimination cannot be a compelling interest. Notably, the Equal Protection Clause does not prohibit nondiverse student bodies in higher education, but this Court has found such diversity to be a compelling interest. *See Grutter*, 539 U.S. at 328 (higher education); *see also Parents Involved*, 127 S. Ct. at 2789 (Kennedy, J., concurring in part and concurring in the judgment) (grade-school). The lack of diversity, moreover, is implicitly assumed to be unintentional. *See Parents Involved*, 127 S. Ct. at 2752-2753 (contrasting the compelling interest of remedying effects of past intentional discrimination, which requires a showing of past intentional discrimination, with diversity, which does not). *Davis*, moreover, itself observed that even though the Equal Protection Clause was limited to intentional racial discrimination, Congress could prohibit unintentional discrimination, 426 U.S. at 248, as it has done in Title VII.

Although this Court has not resolved the question, it has assumed in several decisions that compliance with a federal statute constitutes a compelling interest, and individual Justices have concluded as much. *See, e.g.*, *Abrams* v. *Johnson*, 521 U.S. 74, 91 (1997) (assuming compliance with Section 2 of the Voting Rights Act can be a compelling interest) (citing *Miller* v. *Johnson*, 515 U.S. 900, 921 (1995)); *Shaw II*, 517 U.S. at 915 (same). In *LULAC*, eight Justices concluded that compliance with Section 5 of the Voting Rights Act was a compelling interest. *See* 548 U.S. at 475 n.12 (Stevens, J., concurring in part and dissenting in part, joined as to this point by Breyer, J.); *id.* at 485 n.2 (Souter, J., concurring in part and dissenting in part, joined by Ginsburg, J.); *id.* at 518 (Scalia, J., concurring in the judgment in part and dissenting in part, joined by Roberts, C.J., Thomas, J., and Alito, J.). Several Justices have

agreed that compliance with Section 2 was as well. *Vera*, 517 U.S. at 1033 (Stevens, J., dissenting, joined by Ginsburg, J., and Breyer, J.) (describing majority's assumption that a State has a compelling interest in complying with Section 2 as "perfectly obvious"); *id.* at 990-992 (O'Connor, J., concurring).

2. Respondents satisfy the "strong basis" standard for asserting compliance with Title VII as a compelling interest

Petitioners argue that even if compliance with disparate-impact provisions is a compelling interest, that interest may be asserted only in certain circumstances. Specifically, much like their Title VII arguments, petitioners first assert that the tests must actually violate the disparate-impact provisions if the tests are not to be used for promotions, and second assert that, at the least, a "strong evidentiary basis" for a disparate-impact violation is needed. Br. 33-34. The case law reflects that, rather than proof of a violation, the "strong basis" standard applies—a standard that respondents readily satisfy.

As an initial matter, respondents need not demonstrate an actual violation of Title VII's disparate-impact provisions in order to assert compliance with Title VII as a compelling interest. In *Wygant*, for example, the Court considered the school board's compelling interest in remedying past discrimination and concluded that an actual violation was not required, but rather, the employer must have "a strong basis in evidence for its conclusion that remedial action was necessary." 476 U.S. at 277 (plurality opinion); *see also Croson*, 488 U.S. at 500. The Court has taken the same approach in cases where the compelling interest relates to avoiding future violations. In *Vera*, 517 U.S. at 976

(plurality opinion), the State sought to justify redistricting on the ground that it had a compelling interest in avoiding a violation of Section 2 of the Voting Rights Act. Consistent with the recognition that a State has no compelling interest in "avoiding meritless lawsuits," *Shaw II*, 517 U.S. at 908 n.4, the Court explained that some evidence of a violation of Section 2 was needed, *Vera*, 517 U.S. at 978 (plurality opinion). Nonetheless, the Court stopped well short of requiring—as petitioners would have it—evidence that would prove a Section 2 violation and required instead a "strong basis in evidence." *Id.* The Court's refusal to require an actual violation is appropriate here given the consequences of imposing such a high threshold. As in the Title VII context, *see supra* Part I.B., requiring an actual disparate-impact violation may serve to freeze employment practices, including those that are in fact discriminatory, because of the disincentives this standard creates for employers.

Here, as detailed above, there is evidence of a prima facie disparate-impact violation—indeed, the statistical disparity is extreme. *See supra* Part I.C.2.a.; Pet. Br. 50-51. The Board also heard evidence of flaws in test design and test content that support the conclusion that the tests were not properly assessing candidates for promotion and in turn reinforce the inference of a disparate-impact violation. *See supra* Part I.C.2.b. The Board also heard evidence of a number of equally valid, less-discriminatory alternatives. *See supra* Part I.C.2.c. Petitioners, meanwhile, have identified no evidence that shows concerns about test flaws or alternatives ultimately to be unfounded. Such circumstances are more than sufficient to establish a "strong basis" as a matter of law; there is not merely evidence of a prima facie case, but a prima facie case plus evidence of test

flaws and less-discriminatory alternatives that substantiated the inference of discrimination. *See generally supra* Part I.C.[38]

C. The Non-Certification Of The Test Results Was, By Definition, Narrowly Tailored To Achieve The Compelling Interest In Avoiding Violations Of Title VII's Disparate-Impact Provisions

Where a State's compelling interest is to avoid violating a federal anti-discrimination statute, its conduct is narrowly tailored if it "remed[ies] the anticipated violation or achieve[s] compliance." *Shaw II*, 517 U.S. at 916. That is precisely what has happened here: The compelling interest was to avoid an anticipated violation of Title VII by certifying and using the tests for promotions, and the challenged conduct—declining to certify the tests and use them for promotions—did just that and no more. *LULAC*, 548 U.S. at 519 (Scalia, J., concurring in the judgment in part and dissenting in part) (the State may not "use racial considerations to achieve results beyond those that are required to comply with the statute").

This Court has warned that the State must engage in "serious, good faith consideration of workable race-neutral alternatives that will achieve the [goal]" and must not "unduly harm members of any racial group." *Grutter*, 539 U.S. at 339, 341. Here, the City's one-time

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[38] The Court's cases addressing the "strong basis in evidence" standard do not undermine the conclusion that it is satisfied here. In these cases, the defendants fell well short of establishing even a prima facie case of a violation. *See, e.g., Croson*, 488 U.S. at 500 (city's evidence provided "nothing approaching a prima facie case of a constitutional or statutory violation"); *Abrams*, 521 U.S. at 91 (none of the "threshold findings" for the violation was established).

conduct regarding promotions did not prefer one race over another and by nature does not inflict undue harm on particular racial groups.[39] *See* U.S. Br. 31 (observing that while those who did well on the tests may be disappointed, "disappointment is not in itself the sort of 'unacceptable burden' on innocent persons, [*United States* v.] *Paradise*, 480 U.S. [149,] 182 [(1987)] (plurality opinion), that must frustrate the accomplishment of compelling interests as a constitutional matter"). Non-certification was also more narrowly-tailored than other race-neutral options, such as promoting by lottery or abolishing promotions altogether.

Petitioners' suggestions of more narrowly-tailored options are entirely misplaced as they concern "steps [that] might have [been] taken prior to administering the tests[.]" Br. 41. Such "alternatives" are irrelevant to respondents here, once faced with tests that appeared, based on a variety of evidence, to violate Title VII. Strikingly, one of the alternatives proposed (Br. 41) is "tutoring programs" targeted at minorities. But such conduct is subject to exactly the type of overbroad equal protection claim petitioners have brought in this case—that a decision undertaken by an employer with racial considerations in mind is automatically subject to strict scrutiny and invalid. This suggestion, moreover, unlike the conduct at issue here, allocates burdens and benefits according to race.

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[39] *Cf. Wygant*, 476 U.S. at 282-283 (plurality opinion) ("Denial of a future employment opportunity is not as intrusive as a loss of an existing job.").

CONCLUSION

For these reasons, the judgment of the Second Circuit should be affirmed.

Respectfully submitted.

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MARCH 2009

125 (36) (37)

Nos. 07-1428, 08-328

FILED
APR 7 - 2009
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

FRANK RICCI, ET AL.,

Petitioners,

v.

JOHN DESTEFANO, KAREN DUBOIS-WALTON, THOMAS UDE, JR., TINA BURGETT, BOISE KIMBER, MALCOLM WEBER, ZELMA TIRADO, AND CITY OF NEW HAVEN,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit

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INTRODUCTION

The Equal Protection Clause and Title VII do not allow government employers to use unsupported claims of feared disparate-impact liability to circumvent race-neutral state and local merit systems to racially balance their workforces.

Respondents no longer even attempt to defend the legal immunity for good-faith assertions of voluntary compliance with Title VII that they sought and won in the district court and Second Circuit, and defended in opposing certiorari. See Pet.App. 24a, 43a; BIO 13-14; CA2 Resp.Br. 19-20; Defs.' Memo. in Support of Motion for Summary Judgment (Dkt. No. 52) 18-19. Until now, respondents never argued that they had a strong evidentiary basis for their actions. Instead, they repeatedly acknowledged lacking information to challenge the content-validity of the tests or to substantiate the equal validity or lower adverse impact of any potential alternative. They instead staked their defense on their asserted good-faith belief that equally valid alternatives existed and their desire to "explore" for them.

Abandoning that defense, respondents now attack test validity for the first time, and suggest new alternatives neither the board nor even the district court heard about. But predictable complaints by unhappy test-takers, vague allusions to potential alternatives from IOS's competitor, and the urgings of a city lawyer without expertise in either firefighting or test design could not justify rejecting the results.

Those statements were substantively unfounded and moreover cannot be considered evidence because they were admitted only as state-of-mind hearsay. Respondents' explication of their razor-thin disparate-impact case also improperly ignores the ample contrary evidence that their process of 'questioning' the tests was predetermined. The Court should reject respondents' attempt to assert a newly hatched, previously waived and disclaimed, and completely unsupported fact-intensive defense of the Civil Service Board's decision (including new assertions never made to the board) to reject the promotions.

The weaknesses of respondents' fact-focused arguments highlight the important legal questions respondents attempt to deflect and obscure. While retreating from the blanket good-faith immunity they previously asserted, respondents (and the United States) substitute a supposed hurdle that is effortless to cross. The legal standards they suggest under both Title VII and the Equal Protection Clause would effectively allow government employers to abandon valid employment-test results whenever a mere numerical disparity is accompanied by any critical comments, however cursory, biased, or unsubstantiated. This would encourage government employers to choose numerical racial balancing over merit, negating the benefits civil-service laws provide in ensuring fairness in public employment, to the detriment of public (and first-responder) safety. It would also thwart strict scrutiny's purpose of smoking out illegitimate uses of race by public officials. The Court

should reject those standards and make clear that public employers may burden nonminorities with the weight of remedial measures only on a substantial demonstration that liability likely exists, and only in an appropriately narrowly tailored way.

ARGUMENT

I. RESPONDENTS VIOLATED THE EQUAL PROTECTION CLAUSE.

A. Strict Scrutiny Applies.

Strict scrutiny applies to respondents' refusal to certify the promotional lists because of the race of the eligible individuals. Contrary to respondents' assertion that there were no "state-mandated racial labels" that "determine[d] the allocation of benefits and burdens," Resp.Br. 42, respondents literally assigned the candidates racial labels on race-coded results lists, then determined to deny promotion to successful candidates, and give unsuccessful candidates a do-over, based on those labels and the race of the top-scoring candidates. Respondents' actions relied more heavily on individual racial labeling than the strictly scrutinized actions in other, recent cases in which race was merely one of many factors considered. *E.g.*, *Gratz* v. *Bollinger*, 539 U.S. 244 (2003); *Grutter* v. *Bollinger*, 539 U.S. 306 (2003); *Parents Involved in Cmty. Schs.* v. *Seattle Sch. Dist. No. 1*, 127 S.Ct. 2738 (2007).

Nor does respondents' equal-treatment argument change the race-based nature of their actions: "racial

classifications receive close scrutiny even when they may be said to burden or benefit the races equally." *Shaw* v. *Reno*, 509 U.S. 630, 651 (1993); accord *Powers* v. *Ohio*, 499 U.S. 400, 410 (1991). Similarly, *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469 (1989), mandates strict scrutiny. Richmond cancelled all bids on a contract because no bidder met the percentage requirements for a minority set-aside. *Id.*, at 483.[1] Respondents cancelled the promotions because they did not meet their requirements for a certain percentage of successful minority candidates.[2] Nor is there any strict-scrutiny exception for *ad hoc*, as opposed to formalized, racial classifications. Indeed respondents' use of the four-fifths guideline is effectively a functional vacancy set-aside.

There is also ample evidence that race motivated respondents' decision. Pet'r.Br. 24-25. Respondents' actions were racially motivated, relied on racial labels, and had differential racial effects—all of which compel the application of strict scrutiny. See, *e.g.*, *Vill. of Arlington Heights* v. *Metro. Hous. Development Corp.*, 429 U.S. 252, 266 (1977) ("The impact of the

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[1] Since all bids were cancelled, respondents are incorrect to claim *Croson* is different because it involved "differential treatment." Resp.Br. 43.

[2] That some minority candidates were successful does not mean the respondents' decision not to promote was non-race-based. There was no suggestion in *Croson*, for example, that the analysis would have differed if the contractor had been rejected for having 10% minority subcontractors instead of the 30% Richmond required.

official action . . . may provide an important starting point."); see also *Washington* v. *Davis*, 426 U.S. 229, 242 (1976). The successful candidates' race was clearly the "predominant factor" behind the decision not to certify. Pet'r.Br. 10-14, 23; *Bush* v. *Vera*, 517 U.S. 952, 959 (1996) (plurality opinion). Nor do respondents' claimed concerns about possible disparate-impact liability or lawsuits somehow make their reasons non-race-based.[3] See *Shaw*, 509 U.S. at 653-654 (rejecting as "flawed" the argument that strict scrutiny did not apply because of the need to "take race into account in order to comply with the Voting Rights Act").

Disfavoring nonminorities by cancelling promotions, to avoid being sued for racial discrimination by minorities for promoting too many nonminorities, is a race-based action. That is especially true because respondents had so little basis beyond raw racial numbers to think that promoting the successful candidates would likely violate 42 U.S.C. §2000e-2(k). See *infra* Part II.B. There is more than enough record evidence—most of which respondents ignore—that respondents' original goal was to cancel the promotions for impermissible race-political reasons, and that they settled on Title VII compliance as a means to achieve that impermissible end. See *Bush*, 517 U.S. at 959 (plurality opinion); see also U.S.Br. 22-24.

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[3] Respondents do not defend the district court's untenable proposition that race-based motivations are subject to strict scrutiny only when there is evidence of "animus." Pet.App. 47a.

Early emails among respondents proposed Title VII compliance as a device to scrap the promotions. Pet.App. 449a, 459a. Before any board meetings, mayoral appointees met with IOS and focused, not on validity, but "racial" and "political" ramifications. Pet.App. 333a-334a, 812a-816a, 882a-883a. The information presented to the board was selectively managed. Pet.App. 228a-229a, 490a-498a, 817a-819a, 845a-852a. The ensuing board inquiry failed to uncover any solid evidence either to conclude that the tests were not content-valid[4] or to present any equally valid alternative with demonstrably lower adverse impact[5] (and, indeed, Hornick recommended the promotions proceed and Lewis opined that the exams were fair and relevant). See *infra* Part II.B; see, *e.g.*, Pet.App. 558a, 566a-568a. Yet the board still refused to certify. And the mayor would have nullified the promotions by fiat if the board had not done so. Pet.App. 590a-591a, 819a-820a. All this, moreover, was in the context of state courts' stern rebukes of New Haven's attempts by "charade" and "subterfuge" to circumvent state merit rules.[6]

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[4] None of respondents' district-court affidavits mentioned any test-validity concerns.

[5] Importantly, respondents misstate the elements of disparate-impact liability, ignoring the additional, clear statutory requirement that "the respondent refuses to adopt such alternative." 42 U.S.C. §2000e-2(k)(1)(A)(ii).

[6] Petitioners do not assert that the state courts had held respondents engaged in the illegal practices for racial reasons; the state courts did not reach that question. Pet'r.Br. 5. But the Connecticut Supreme Court specifically noted that the allegations and evidence about race-based abuse of score banding

(Continued on following page)

Respondents simply ignore most of petitioners' evidence, recast other evidence in a self-favoring light, and perfunctorily state that no summary-judgment fact issues exist. Resp.Br. 49. Respondents now assert that the only relevant evidence is the rejecting board members' professed reasons for their votes. *Id.* 48-49. But that argument ignores that the board members were appointed by the mayoral administration of which the other respondents were members, that the board vote was part of a process that was instigated and shepherded by the other respondents, including selective management of the information the board received, that respondent Kimber threatened the board members with race-political ramifications if promotions proceeded, and that the mayor stood poised to nullify the board's vote had it gone the "wrong" way. That evidence was relevant to whether the board's decision was tainted by impermissible racial motives. See, *e.g.*, *Back* v. *Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 125-126 (CA2 2004) ("[I]t is clear that impermissible bias of a single individual at any stage of the promoting process may taint the ultimate employment decision . . . so long as the individual shown to have the impermissible bias played a meaningful role in the . . . process." (quotation omitted)).[7]

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posited "exactly the abuse of discretion based upon nepotism and racism that the civil service system is meant to prevent." *Kelly* v. *City of New Haven*, 881 A.2d 978, 1000, n.40 (Conn. 2005).

[7] Nor is *City of Mobile* v. *Bolden*, 446 U.S. 55, 74, n.20 (1980), to the contrary. Petitioners' challenge is not to the system

(Continued on following page)

Respondents devote a great deal of emphasis to slippery-slope arguments that applying strict scrutiny will require strictly scrutinizing a broad range of government practices, and prevent the salutary use of race-conscious proxies. *E.g.*, Resp.Br. 47-48. But a retrospective cancellation of a legally mandated selection process based on the race of the successful is meaningfully different from prospective changes that are made without knowing, and not based on, the races of the individuals who will qualify. That is, as respondents ironically emphasize, "[h]aving decided to use the [test, respondents] must accept the constitutional burdens that come with this decision."[8] *Grutter*, 539 U.S., at 370 (Thomas, J., concurring in part and dissenting in part); Resp.Br. 46. Once the city announced its examination process, allowed and encouraged candidates to "strive" and "study" for three months, Pet.App. 360a, and generated a list of those eligible for promotion, it could not then point to the race of those who would be promoted and reject them because of racial imbalance.

Further, unlike most of the practices respondents claim would be threatened, respondents' actions did not involve the use of generalized race-conscious

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for selecting the mayor or the board, but to the board's decision to nullify the test results—a decision in which the other respondents played a direct and influential part.

[8] The board was *not* deciding whether to use the test, as respondents consistently imply. That decision had already been made. State and local law required competitive job-related tests and the promulgation of the eligibility lists. See Pet'r.Br. 4.

measures such as school-site selection or providing aid generally to the disadvantaged. See *Parents Involved*, 127 S.Ct., at 2792 (Kennedy, J., concurring in part and concurring in the judgment); *Croson*, 488 U.S., at 528 (Scalia, J., concurring in the judgment). Respondents looked at (and only at) the candidates' race, not any proxy. Petitioners' arguments against such pointed, pernicious injuries inflicted on identifiable individuals thus pose no danger to prospective use of generalized race-conscious proxies to achieve legitimate goals.

B. Avoiding an Unsupported Claim of Disparate-Impact Liability Is Not a Compelling Interest.

The Equal Protection Clause does not allow government actors to engage in intentional racial discrimination to counter the effects of adverse impact that may arise from any number of causes other than intentional discrimination by that government entity. The Court has recognized only remedying past intentional discrimination as a compelling interest in the employment context and has never suggested that there is a compelling interest, sufficient to allow intentional racial classifications, in avoiding numerical disparities that do not arise from intentional racial discrimination. See, *e.g.*, *Croson*, 488 U.S., at 507; *Wygant* v. *Jackson Board of Educ.*, 476 U.S. 267, 276 (1986) (plurality opinion). Indeed, *Wygant*, *Croson*, and *Adarand Constructors, Inc.* v. *Peña*, 515 U.S. 200 (1995), were all decided against a background of numerical disparities in government contracting and

employment, yet in each the Court specifically determined that government could not act directly to counterbalance those disparities without a strong evidentiary basis that they existed because of the government's own intentional discrimination.

The Court has made clear that the Equal Protection Clause forbids only intentional racial discrimination in governmental employment, not mere disparate impacts. *Washington*, 426 U.S., at 242. Consistent with that bedrock principle, the Court has repeatedly condemned racial balancing and made clear that disparate-impact analysis should not be allowed to develop into a one-way ratchet requiring it. See, *e.g.*, *Watson* v. *Fort Worth Bank & Trust*, 487 U.S. 977, 993 (1988) (plurality opinion). "If avoiding disparate impact were a compelling governmental interest, then racial quotas in public employment would be the norm." *Biondo* v. *City of Chicago*, 382 F.3d 680, 684 (CA7 2004). To avoid that result, which this Court has repeatedly condemned, avoiding §2000-e2(k) liability cannot be a compelling state interest.[9]

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[9] Nor are the voting rights cases cited by respondents, Resp.Br. 50-51, to the contrary. Instead, they are consistent with the principle that statutory compliance can be a compelling interest only when accompanied by a need to remedy identified past discrimination. *E.g.*, *League of United Latin American Citizens (LULAC)* v. *Perry*, 548 U.S. 399, 518 (2006) (Scalia, J., concurring in the judgment in part and dissenting in part) ("Moreover, the compelling nature of the State's interest in §5 compliance is supported by our recognition in previous cases that race may be used where necessary to remedy identified past discrimination.").

If avoiding disparate impact ever could be a compelling interest, however, it could only be when the likelihood of liability under §2000e-2(k) is established by a strong basis in evidence. That strong-basis-in-evidence standard requires more than merely a *prima facie* demonstration of numerical imbalance, which may exist as a result of societal factors without any discrimination by the government. The Court has long held that government cannot constitutionally use racial classifications to counteract that imbalance without a demonstration that it is remedying the effects of the government's own intentional discrimination. Otherwise, government actors will be free to engage in intentional racial discrimination and race-balancing based on nothing more than statistical disparity, contrary to the intent of Congress and a long line of cases from this Court. Pet'r.Br. 34-36; *Washington*, 426 U.S., at 242.[10]

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[10] *Croson*'s statement that Richmond's set-aside lacked a strong basis because "there is nothing approaching a *prima facie* case of a constitutional or statutory violation," 488 U.S., at 500, is not to the contrary. Saying there was no strong basis because there was not a even a *prima facie* case is not to say that a *prima facie* case is a strong basis, and indeed the rest of the opinion indicates that a more searching analysis is required. *E.g.*, *id.*, at 501 ("[B]lind judicial deference to legislative or executive pronouncements of necessity has no place in equal protection analysis."). Moreover, in *Croson*, as elsewhere in this Court's cases, the discussion was about whether there was a strong basis in evidence of past intentional discrimination by the municipality, not evidence of mere numerical disparity. *Ibid.*

Respondents appear to now concede that mere numerical disparity is not enough to constitute a compelling state interest. Resp.Br. 54. They assert that the board was presented with "evidence" of test invalidity and of equally valid less discriminatory alternatives, and they claim petitioners "have identified no evidence that shows concerns about test flaws or alternatives to be ultimately unfounded." *Ibid.* They ignore the evidence marshaled by petitioners that the tests were painstakingly validated, Pet'r.Br. 51-52, not to mention ignoring that their merits brief in this Court is the first time, after repeated explicit concessions that validity was not at issue, that respondents have purported to have acted based on concerns about test validity. *E.g.*, Pet.App. 1024a. This argument also ignores petitioners' detailed explication in their opening brief of the insufficiencies in the evidence of alternatives, including the ways in which it fell far short of applicable EEOC requirements, and the fact that the sole expert who made comments about alternatives expressly recommended that the city proceed with promotions. Pet'r.Br. 52-54. Nor do respondents ever explain how, given that they are no longer defending the district court's rule of immunity for good-faith efforts at complying with Title VII, it was correct for the district court to grant summary judgment on what is, at a bare minimum, a factually contested record on these issues. See *infra* Part II.B.

C. Cancelling the Promotions Was Not Narrowly Tailored.

Finally, even if respondents had a compelling interest in avoiding Title VII disparate-impact liability, their cancellation of the promotions was not the most narrowly tailored way to achieve it. Respondents knew in advance that past exams had demonstrated similar levels of disparate impact, Pet.App. 775a-779a, 950a-957a, 1019a-1020a, and could have taken a number of additional proactive steps to avoid or minimize it. The respondents cite no authority for their proposition that pre-test measures are irrelevant to the tailoring analysis, and there is no basis for such a distinction. Cf., *e.g.*, *Contractors Assn. of E. Pa., Inc.* v. *City of Philadelphia*, 91 F.3d 586, 609 (CA3 1996) (identifying prospective efforts to reduce entry barriers, provide training, and support financing as narrower alternatives to set-aside).[11]

Even after the test, respondents could have tried narrower alternatives. Most obviously, if they really had concerns about test validity (despite disclaiming that continually until now), they could have pursued the narrower alternative of marshaling competent

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[11] The contention in this context that petitioners merely suffered "disappointment," is offensive. Resp.Br. 56; U.S.Br. 31. The petitioners sacrificed greatly to perform well on the tests. See, *e.g.*, Pet.App. 376a-378a, 404a-405a, 407a-408a. Their success entitled them to promotion, with concrete benefits such as increased salary and seniority. Pet'r.Br. 8, 25-26. Nor does the rule of three decrease the certainty that most of the petitioners would have been promoted immediately, especially given the NHFD's practice of promoting in rank order.

evidence to establish the tests' validity, for example by receiving the IOS technical report. See *infra* Part II.B. Even beyond that, there were measures more narrowly tailored than refusing to fill the vacancies, including ones respondents themselves suggest.[12] Resp.Br. 7-8, 35. Cancelling the promotions outright was clearly not the narrowest means for the city to achieve its allegedly compelling interest.

II. RESPONDENTS VIOLATED TITLE VII.

Respondents apparently now agree that an objective standard governs whether a government employer had reason to act to avoid liability under §2000e-2(k). They disagree merely on how much evidence is enough. Petitioners' strong-basis-in-evidence standard is the correct one, because it best harmonizes the several provisions of Title VII while avoiding the negative consequences of a rule that confers a lopsided leeway to throw out test results based on any stray comment about test validity or the possible availability of alternatives. In any event, it is impossible to affirm the summary judgment, given the lack of any evidence substantiating any objective likelihood of disparate-impact liability, respondents' concessions on test validity, and the underlying

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[12] Notably, both suggestions—reweighting, and use of cutoff scores—contradict respondents' claim that the tests might have been invalid.

insufficiency of the materials before the board to show any likelihood of liability.

A. Petitioners' Strong-Basis-in-Evidence Standard Is the Correct Standard.

Title VII neither permits nor immunizes intentional discrimination to avoid potential §2000e-2(k) liability unless there is at least a strong basis in evidence that an actual violation is likely, including a substantial showing on the issues of test invalidity or suitable alternatives. This is particularly so for public employers, who are also subject to the Equal Protection Clause. Petitioners' interpretation of Title VII neither sets the statute against itself nor creates any dilemma for government employers. Instead, it preserves employer flexibility without imposing a one-way ratchet towards race-balancing, carefully balances competing employee interests, respects the bounds imposed by the Constitution, and gives governments desirable incentives to choose the best option among available alternative courses of action. Respondents' approach, in contrast, not only puts §2000e-2(k) into conflict with other subsections of the statute, but confers unconstrained discretion to use mere numerical disparities to discard test results that display the "wrong" racial balance.

As the Court has long recognized, adverse impact can arise from numerous sources, most of which do not reflect employer discrimination and which therefore cannot be remedied by government with racial

classifications. See *Watson*, 487 U.S., at 992 (noting statistical disparities may create "undue pressure" to "adopt inappropriate prophylactic measures" in light of "the myriad of innocent causes that may lead to statistical imbalances"). A demonstration of numeric adverse impact under the EEOC guidelines does not establish or nearly establish liability, but only creates an easily rebuttable presumption, and as such cannot be sufficient to allow employers to intentionally discriminate.[13] Cf. *Furnco Constr. Corp.* v. *Waters*, 438 U.S. 567, 576-579 (1978) ("[C]ourts may not impose . . . a remedy [for racial imbalance] on an employer at least until a violation of Title VII has been proved"). It is a much lower bar, for example, than the "threshold conditions" for vote dilution liability under §2 of the Voting Rights Act, to which respondents advert. See *NAACP* v. *City of Niagara*, 65 F.3d 1002, 1019, n.21 (CA2 1995) ("[I]t will be only the very unusual case in which the plaintiffs can establish the existence of the three *Gingles* factors but still have failed to establish a violation of §2 under the totality of the circumstances.").

Respondents' minimal adverse-impact-plus standard, like the United States's reasonable-basis standard, would be deeply harmful and contradict this Court's interpretations of the statute. It would give

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[13] At a minimum, mere numeric disparity is not a strong basis when there is additional evidence of test validity voiding any inference of discrimination from mere numbers. See *Tex. Dept. of Cmty. Affairs* v. *Burdine*, 450 U.S. 248, 255 & n.10 (1981).

employers a compelling incentive, when confronted with numbers showing adverse impact, to always abandon valid, fair, and job-related selection procedures merely to forestall dubious disparate-impact claims. "Avoiding disparate impact" would become the very engine for racial balancing that the evidentiary standards for proving disparate impact are intended to prevent. See *Watson*, 487 U.S., at 993. Such results are especially likely because test development and post-test proceedings are solely within the knowledge and control of the government employer. See *Ho ex rel. Ho* v. *San Francisco Unified Sch. Dist.*, 147 F.3d 854, 865 (CA9 1998).

Instead, assessments of whether an employer had a strong basis in evidence to throw out a test to avoid disparate impact must consider whether the employer had, at the time of its decision, reliable information demonstrating either test invalidity or the proven existence of an equally valid alternative with less disparate impact, the refusal of which likely would have resulted in §2000e-2(k) liability.[14] Importantly,

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[14] Neither *Johnson* v. *Transportation Agency, Santa Clara County*, 480 U.S. 616 (1987), nor *United Steelworkers of America* v. *Weber*, 443 U.S. 193 (1979), supports respondents' suggestion that Title VII requires less than the constitutional strong-basis-in-evidence standard. See *Croson*, 488 U.S., at 500. In both cases, employers acted to end manifest imbalances resulting from long histories of job-category segregation that raised strong inferences of past intentional discrimination. *Johnson*, 480 U.S., at 631-632; *Weber*, 443 U.S., at 208-209. Respondents cannot and do not claim such a manifest imbalance in NHFD's ranks, see Pet.App. 945a (disclaiming remedying past discrimination as

(Continued on following page)

respondents misstate the necessary conditions for disparate-impact liability, repeatedly asserting that the mere existence of an equally valid, less discriminatory alternative is sufficient to establish liability, but ignoring the additional, clear statutory requirement that "the respondent refuses to adopt such alternative." 42 U.S.C. §2000e-2(k)(1)(A)(ii); see Resp.Br. 16, 22, 32. This additional statutory requirement means liability cannot be established—and thus, a sufficient strong basis in evidence for an impending disparate-impact violation cannot be established—by introducing fanciful alternatives for the first time during litigation, as respondents now attempt to do.

Requiring government employers to possess sufficient evidence of an impending disparate-impact violation balances the potentially conflicting demands of Title VII's disparate-treatment and disparate-impact prohibitions. In contrast, respondents' interpretation fosters conflicts between these provisions by encouraging and immunizing conduct that violates §2000e-2(a) in order to avoid the mere potential for disparate-impact claims, even frivolous ones. Indeed, respondents' interpretation introduces significant tensions throughout Congress's statutory scheme—yet they simply fail to respond convincingly to the

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a motivation), perhaps in part because New Haven's rule-of-three already permits exactly the multi-factor evaluation of equally qualified candidates approved in *Johnson*. See 480 U.S., at 625.

ways their interpretation puts §2000e-2(k) in collision with §2000e-2(h), (j), and (*l*). Pet'r.Br. 43-44, 46, 55, 62-66.

Petitioners' rule does not require employers to prove a violation against themselves—indeed, no violation under §2000e-2(k), absent test invalidity, could ever be proven until the employer refused to adopt a demonstratedly suitable alternative. Rather, the employer's burden to justify race-based action may be carried when the employer has sufficient objective and verified information to demonstrate that a disparate-impact violation would likely occur. Requiring a strong basis in evidence directly channels employers' efforts to avoid disparate impact into the least discriminatory means of doing so—for instance, by simply determining that the selection procedure is job-related and consistent with business necessity.

Petitioners' standard will not chill employers' attempts to improve ongoing hiring processes or lead to aggressive uses of race. Neither Title VII nor the Constitution bars prospective measures to reduce disparate impact that do not rely on racial classifications—indeed, respondents engaged in substantial efforts before it gave these tests. See *supra* Part I.A; Pet'r.Br. 6-9. And petitioners' rule actually reduces the incentives government employers would have under respondents' rule to aggressively use race-based measures to "remedy" mere numeric disparities. In contrast, respondents' interpretation of Title VII ignores the clear statutory prohibition on intentional discrimination—and the principle of nondiscrimination that is

the core of Title VII itself—by providing unbounded license to discard the results of fair, job-related selection processes based on no more than predictable levels of adverse impact and the bare assertions of belief that §2000e-2(k) might have been violated.[15]

B. Respondents Lacked a Strong Basis in Evidence to Justify Their Race-Based Actions.

Respondents should not be permitted to whipsaw the courts by asserting arguments that not only were not made below, but were both factually and legally disclaimed. Respondents' defense below, which the district court adopted, was predicated on immunity for subjective good-faith—with good reason, since respondents did not have a strong basis in evidence for their action, as even the district court noted. Pet.App. 34a. Even if it were proper to disregard respondents' concessions, the summary-judgment evidence conclusively shows that respondents completely lacked a strong basis in evidence to conclude that abandoning the tests was necessary to avoid a §2000e-2(k) violation, and strongly indicates that their cancellation of the promotions was impermissible

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[15] Notably, neither respondents nor the United States suggests any limit on permissible remedial actions once the employer has the proper (low, in their view) quantum of evidence. Instead, either would allow (and respondents suggest) acts that would otherwise violate §2000e-2(a), §2000e-2(*l*), state law, and §2000e-7. See *infra* Part II.B; Resp.Br. 32, 35.

intentional race discrimination.[16] Respondents' assertions that there are no disputed facts relevant to either the likelihood of §2000e-2(k) liability or their underlying discriminatory motives rely on an improperly one-sided version of the factual record. *Contra* FED. R. CIV. P. 56(c); *Hunt* v. *Cromartie*, 526 U.S. 541, 552 (1999).

1. The Numerical Disparity Was Not "Severe."

Statements in the record contradict respondents' claim that the adverse impact was "severe." *Compare* Resp.Br. 27, *with* Pet.App. 555a-556a (Hornick); 677a (Legel); 423a-427a (Egan). The record further shows that earlier captain and lieutenant promotional examinations respectively had comparable and greater adverse impact ratios. Pet.App. 28a, 423a-427a, 678a-679a, 699a-701a. Further, respondents incorrectly imply that no African-American firefighters would

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[16] Respondents insist intent to discriminate must be proven as pretext in the third step of a *McDonnell Douglas* analysis, but this ignores that the purported decision to voluntarily comply with Title VII was driven by petitioners' race. Since a protected trait "actually motivated the employer's decision . . . and had a determinative influence on the outcome," *Hazen Paper Co.* v. *Biggins*, 507 U.S. 604, 610 (1993), there was direct and uncontested evidence that petitioners' race motivated the adverse employment decision. But even under the *McDonnell Douglas* framework, there is clearly a genuine issue of material fact on pretext defeating any possibility of awarding respondents summary judgment on this record.

have been eligible for promotion when in fact several would have been promoted within two years of the lists' certification. Pet.App. 235a-236a, 305a-306a, 420a-422a.

2. Respondents Did Not Have an Evidentiary Basis to Conclude That the Tests Were Invalid.

Respondents now attempt to muster purported "evidence" questioning examination validity by cataloguing stray, unsubstantiated remarks to the board and introducing new matters the board never even heard about. But respondents have never previously argued the tests were not job-related or consistent with business necessity. Instead, respondents stated to the district court that "certainly at the time we gave [the exam] we thought it was valid," adding that "we have no information to rebut its validity." Pet.App. 1024a; see also Pet.App. 939a-941a (district-court brief conceding validity).[17] Nor did respondents substantiate the few complaints the board heard or turn them into admissible district-court evidence. Instead, respondents introduced the unsworn hearsay statements not for their truth, but merely to show the subjective good-faith belief that has heretofore been

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[17] Neither of the two board members who voted against certification even mentioned validity in their affidavits. See CA2 J.A. 1604-05, 1610-11.

respondents' sole defense.[18] Pet.App. 14a, 1024a-1025a. Nor did respondents contest validity in the Second Circuit or their brief in opposition.[19] See *Pa. Dept. of Corrs.* v. *Yeskey*, 524 U.S. 206, 212-213 (1998). This was for good reason—the record shows that in collaboration with city officials, IOS engaged in a careful examination development and validation process that included detailed questionnaires, interviews, ride-along exercises with diverse incumbents, and consultation with top NHFD officials. Pet.App. 150a-154a, 262a-264a, 337a-343a, 597a-650a.

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[18] Indeed, respondents moved the district court to strike evidence regarding test development and validity. *E.g.*, Defs.' Reply to Pls.' Objection to Defs.' Motion to Strike (Dkt. No. 102) 7 ("Evidence of preexamination planning and the test validity is, however, irrelevant because the issue is not whether the tests were valid.").

[19] Respondents' amici's briefs on test validity are thus irrelevant, because they address an issue definitively not before the Court, and by their belatedness deprive the Court of any adversary presentation on the issue. Indeed, the opinions by the five industrial-organizational psychologists have been discredited in the profession. See, *e.g.*, Schmidt, Why All Banding Procedures in Personnel Selection Are Logically Flawed, 8 Human Performance 165 (1995). Further, the fact that employers can so easily find experts to make unsubstantiated criticisms without having seen the tests or any test-development data should emphasize to the Court the need to adopt a meaningful evidentiary standard subject to adversary proof. For example, one of the very amici arguing against written exams here recommended increasing the weight on written exams to 70% in neighboring Bridgeport. *Burke* v. *City of Bridgeport*, No. CV074021941S, 2008 WL 1735584, at *2 (Conn. Super. Ct. 2008).

In any event, the comments at the board meetings gave no basis to question the tests' validity. Failing to acknowledge that Vincent Lewis, the only expert who had actually examined the tests, found the content to be appropriate, Pet.App. 563a-569a, respondents instead highlight statements from a consultant who did not review the tests and a lawyer with no basis to contest them. Respondents' summary of Hornick's statement ignores that he recommended the board certify the eligibility lists and proceed with the promotions. Pet.App. 558a. He stated that the written exams' adverse impact was "generally in the range of what we've seen professionally," Pet.App. 549a, and noted the adverse impact caused by the oral assessment, Pet.App. 550a—which respondents do not even challenge, and hardly mention.

Hornick's general comments about the use of written or multiple-choice exams offered no specific evidence about the tests IOS actually prepared that could support such criticism. Respondents concede Hornick may not even have seen the tests. Pet.App. 1030a. And it is widely acknowledged that written, multiple-choice exams are reliable measures of job knowledge, and widely used in firefighting and other occupations. Cf. Pet.App. 623a-624a. Moreover, substantial evidence in the record, including the predominantly favorable candidate feedback questionnaires, confirms that the tests fairly and validly tested candidates' KSAs. See Pet.App. 329a-335a, 338a, 603a-606a, 633a-634a, 1024a.

As for Ude, he is a lawyer with no experience or knowledge to evaluate content validity, who thus had

no basis to compare these tests to those in *Vulcan Pioneers, Inc.* v. *N.J. Dept. of Civil Service*, 625 F.Supp. 527, 548 (DNJ 1985).

Similarly unfounded is respondents' suggestion (never presented below) that 2 of the 200 written-examination questions were inappropriate. Respondents never attempt to demonstrate how two purportedly irrelevant questions could have invalidated the tests, or changed the outcome. Cf. *id.* at 547 (criticizing allowing "picayune analysis to discredit a prior test" and emphasizing the importance of evaluating "the totality of the test").

Moreover, these two alleged flaws are based not on the actual tests, but on two test-takers' faulty recollections to the board months later. Resp.Br. 29. The complained-of uptown/downtown question was drawn directly from the study text, and simply tested for the knowledge that on a one-way street it is better to park up the street to prevent traffic from interfering with fire operations. *Contrast* J.A. 48 *with* Pet.App. 1094a (filed under seal); V. Dunn, Command and Control of Fires and Emergencies 67 (1999); Pet.App. 354a. The complaint that a test question about traffic collisions misrepresented NHFD procedure is simply wrong—the question never mentioned any "supervisor apparatus," but indeed offered contacting a battalion chief as a response.[20] *Compare* J.A.

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[20] Respondents' low-bar standard would allow drastic remedial action by employers based merely on such unfounded complaints.

44-45 *with* Pet.App. 1131 (filed under seal). Respondents further disregard the procedure, which Legel described to the board, allowing test-takers to challenge exam questions, whereby a legitimate complaint would lead to discarding the question and adjusting all scores. Pet.App. 523a-525a, 647a. There is no evidence the complainants used that process or that respondents made any effort to investigate the two complaints.

Also mistaken are respondents' belated criticisms based on points about which the board never heard but that have recently "come to light." Resp.Br. 30; cf. *Little* v. *Ill. Dept. of Revenue,* 369 F.3d 1007, 1015 (CA7 2004) (explaining that Title VII analysis focuses on decisionmaker's knowledge at the time of decision). For example, there is no merit to respondents' criticism of IOS for not using an Angoff workshop to determine cutoff scores. Legel explained, and it is unrebutted, that "the examinations were calibrated such that minimally qualified job performance equated to the 70% composite [ ] cutoff score" required by the city charter. Pet.App. 77a, 330a. Angoff workshops are used to define cutoff scores for written exams, not oral assessments, and are inappropriate for defining a cutoff for a composite oral/written exam as was used here. See Cizek, Standard Setting, in Handbook of Test Development 224, 238-242 (Downing & Haladyna eds., 2006). Indeed, an Angoff workshop tied to a cutoff score for the written phase was superfluous because all candidates could proceed to

the oral-assessment phase irrespective of their written-examination performance. Pet.App. 160a, 267a-268a, 666a. Nor would altering the composite cutoff score have changed the rank order for promotions.

Respondents criticize the absence of a New Haven reviewer, but fail to acknowledge that the oral assessment was reviewed by a Connecticut fire chief who had assessed prior New Haven exams, Pet.App. 510a-511a, or that the city itself forbade internal review to protect the exams' integrity in light of past alleged security breaches. Pet.App. 508a-509a, 635a-638a. Indeed, the fact that each of the precise factors respondents now criticize was expressly required by the city or the charter, Pet.App. 77a, 308a-328a, reinforces the unworkability of respondents' standard.

Finally, the city's unwillingness to receive IOS's technical report undermines its new claim to have possessed strong evidence the exams were invalid. Respondents now downplay the significance of a report the city regularly receives, Pet.App. 958a-1011a, but IOS described the EEOC-recommended technical report as "a highly particularized and technical overview" that presents "evidence of validity of the examinations for their intended purpose." Pet.App. 330a-331a. Respondents themselves characterized the technical report as a "validation analysis" but said the city did not need one because validity was not the issue, and it was "prepared to explore" equally valid alternatives. Pet.App. 1032a-1033a. The city deliberately rejected information that would have satisfied its burden under *Albemarle Paper Co.* v.

Moody, 422 U.S. 405, 425 (1975), of proving the job-relatedness of the tests and is now attempting to capitalize on its willful ignorance to launch baseless new attacks on validity.

3. Respondents Did Not Have a Strong Basis in Evidence of Examination Alternatives.

The city's assertion of "equally valid, less-discriminatory alternatives" amounts to mere conjecture based on a few passing references to the board. There is no evidence of any specific alternative that the city considered, as §2000e-2(k) would require, nor is there evidence that any alternative was evaluated for content-validity or disparate impact.

It is impossible to reconcile respondents' new position with their old stance and the courts' findings below. Respondents acknowledged that the record on alternatives "admittedly is not vetted out as to the details," Pet.App. 1017a, and that "there really is no testimony that can be offered about the validity of those potential alternative selection methods," Pet.App. 1022a. According to respondents, the availability and validity of alternatives were "questions for a different day." Pet.App. 1027a. They argued that a city need not "have in mind some specific alternative selection method at a time it decides to abandon the results of a promotional exam." Pet.App. 1031a. And the district court expressly recognized "the shortcomings in the evidence on existing, effective

alternatives," but simply (and incorrectly) found them legally irrelevant. Pet.App. 34a.

Lacking concrete alternatives, respondents now mischaracterize Hornick's mention of assessment centers as a fully vetted alternative. Hornick, IOS's direct competitor, Pet.App. 548a; see 29 C.F.R. §1607.9(A), noted without elaboration that assessment centers and situation-judgment tests are alternative methodologies for administering examinations. Pet.App. 557a. Respondents acknowledged to the district court that his statement was "based primarily on the industry situation, not the specific facts at hand." Pet.App. 1029a-1030a. The board never received any explanation of what "assessment centers" and "situation-judgment tests" were, how they differed from the situation-based oral assessment that had been given, their content-validity, or their comparative adverse impact to the examinations that were administered. See Pet.App. 557a, 853a-854a. The district court noted the lack of any explanation about what an assessment-center approach entailed, the lack of any evidence that it had demonstrably less adverse impact, and Hornick's statements that assessment centers can have adverse impact. Pet.App. 32a; see Pet.App. 390a, 592a; see also *Allen* v. *City of Chicago*, 351 F.3d 306, 311 (CA7 2003) (noting disparate impact caused by assessment approach).

As an additional alternative, respondents cite stray comments about written/oral weighting of the exams, which the board never discussed, and certainly did not adopt. See J.A. 65-66, 150. Indeed, Hornick

told the board the oral component may have had an unexpected adverse impact against Hispanics. Pet.App. 550a. In any event, different weighting options are not "alternatives" under §2000e-2(k) because a city would simply be adjusting the relative disparate impact of the two components.[21] See *San Francisco Police Officers Assn.* v. *City & County of San Francisco*, 869 F.2d 1182, 1184 (CA9 1988); *infra* Part II.C. Nor is it obvious such "alternatives" would be equally consistent with business necessity given the substantial discounting of job knowledge caused by deemphasizing the written component.

Respondents' other suggestion—that the city could simply use their preferred version of the rule of three outlawed by the Connecticut Supreme Court—highlights how far they distort the requirements of state and local law. See 42 U.S.C. §2000e-7; *Kelly* v. *City of New Haven*, 881 A.2d 978 (Conn. 2005). The record provides no discussion of the ramifications of such an approach, which was never considered by the board or courts below. Moreover, score banding could violate §2000e-2(*l*) since the adjustment's purpose would be to achieve a desired racial outcome. See

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[21] Nor is it clear it would have reduced disparate impact. Respondents' proposed reweighting would have eliminated two Hispanic captain eligibles, one Hispanic lieutenant eligible, and grouped almost all other minority lieutenant candidates at the bottom of the list, making it less likely they would ever be promoted. See Pet.App. 429a-432a, 434a-436a. These effects demonstrate respondents' commitment to benefiting one racial group at the expense of all others, minority and nonminority alike.

Chicago Firefighters Local 2 v. *City of Chicago*, 249 F.3d 649, 656 (CA7 2001).

Under respondents' approach, a passing reference to any of the countless hypothetical means of administering or scoring a promotional test could justify a city's discarding valid exam results, turning the evidentiary threshold into a gaping loophole that employers could use to race-norm, notwithstanding Congress's clearly expressed intent. Civil-service regimes would be undermined by creating just the kind of discretion to discriminate (and corresponding opportunities for patronage and corruption) that those regimes are intended to curtail, and as a result would also risk public and first-responder safety.

4. Impermissible Racial Motives Guided Respondents.

Even a brief inspection of the record contradicts respondents' untenable claim that there is no evidence of discriminatory motive. See, *e.g.*, Pet.App. 428a-436a, 784a, 826a (circulation of race-coded eligibility lists); 476a (blunt references to the skin color of the top candidates at board meetings); 490a-498a, 780a-781a, 857a-858a (Kimber's racial charges to the board); 410a-412a, 772a-774a, 812a-816a, 841a, 868a-883a, 928a-932a (Kimber's private discussions with city officials, and prior incendiary racial remarks). Summary judgment on the motive issue was clearly improper. *Hunt*, 526 U.S., at 552.

Respondents attempt to distinguish the board members' intent from that of other individual defendants.

But they cannot ignore the totality of forces acting on the board, including the fact that mayoral appointees enjoined the board not to certify the eligibility lists and city officials' advance commitment to ensuring just such a result. Pet.App. 449a, 590a-591a, 819a-820a, 829a, 833a-834a, 849a-850a; J.A. 134, 153. Even the district court agreed that a jury could infer "that city officials worked behind the scenes to sabotage the promotional examinations because they knew that, were the exams certified, the mayor would incur the wrath of Kimber and other influential leaders of New Haven's African-American community." Pet.App. 49a.

C. Section 2000e-2(*l*) Proscribes Racial Tampering with Test Results.

Respondents avoid substantive discussion of §2000e-2(*l*), fracturing its language to undercut the express prohibition on altering test results. The plain language of the statute prohibits the alteration of test "*results*"—not test scores only, as respondents claim. And respondents' fallback reference to statements in the legislative record that the prohibitions apply only once a test is determined to be employment-related, Resp.Br. 40, is a red herring. Respondents never challenged the validity of the examinations below, see, *e.g.*, Pet.App. 939a-941a, 1023a-1024a, and do not credibly do so now. See *supra* Part II.B. In any event, §2000e-2(*l*) is not limited to applying only after an exam is formally validated.

Notwithstanding petitioners' arguments to the contrary, see, *e.g.*, Pet.App. 1055a-1056a, the district

court made §2000e-2(*l*) aimless surplusage. Shielding the city's race-based negation of test results from the statute's reach would inevitably trivialize the prohibition on "otherwise alter[ing]" test results and allow circumvention of Title VII's racial-tampering ban.

CONCLUSION

For these reasons, the decision of the Second Circuit should be reversed.

Respectfully submitted,

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April 7, 2009

FILED
FEB 26 2009
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Nos. 07-1428 and 08-328

In the Supreme Court of the United States

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ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING VACATUR AND REMAND

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QUESTIONS PRESENTED

1. Whether respondents' failure to certify the results of promotional examinations violated the disparate-treatment provision of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a).

2. Whether respondents' failure to certify the results of promotional examinations violated 42 U.S.C. 2000e-2(*l*), which makes it unlawful for employers "to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race."

3. Whether respondents' failure to certify the results of promotional examinations violated the Equal Protection Clause of the Fourteenth Amendment.

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In the Supreme Court of the United States

No. 07-1428

FRANK RICCI, ET AL., PETITIONERS

v.

JOHN DESTEFANO, ET AL.

No. 08-328

FRANK RICCI, ET AL., PETITIONERS

v.

JOHN DESTEFANO, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING VACATUR AND REMAND

INTEREST OF THE UNITED STATES

The Attorney General and the Equal Employment Opportunity Commission (EEOC) share responsibility for enforcing Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* The Attorney General enforces Title VII against public employers and has brought numerous lawsuits challenging employment examinations under the statute's disparate-impact provisions. The EEOC enforces Title VII against private employers. The Department of Labor enforces parallel provisions in Executive Order No. 11,246, 3 C.F.R. 167 (Supp. 1965),

against federal contractors. This Court's decision could affect those enforcement efforts. In addition, Title VII's anti-discrimination provisions apply to federal employers. 42 U.S.C. 2000e-16(a) and (d). Because some federal agencies use examinations in hiring and promoting employees, the Court's decision may affect the federal government's activities as an employer.

STATEMENT

1. In 2003, the City of New Haven, Connecticut, administered written and oral promotional examinations for its fire department. 07-1428 Pet. App. 6a-7a (Pet. App.). Seventy-seven applicants took the lieutenant examination, of whom 34 passed, and 41 applicants took the captain examination, of whom 22 passed. *Id.* at 7a-8a. On the lieutenant examination, the pass rate for Hispanic applicants was 34% of the pass rate for white applicants; for African-American applicants, the pass rate was 52% of that of white applicants. On the captain examination, the pass rate for both Hispanic and African-American applicants was 59% of the pass rate for white applicants. *Id.* at 7a-8a, 27a-28a.

Under the "Rule of Three" in the City Charter, each available position could be filled only by an individual who was among the three highest scorers. Pet. App. 8a. Use of the examination scores on a rank-ordered basis would have resulted in no Hispanics or African Americans being eligible to fill any of the eight lieutenant positions that were then available, and two Hispanics and no African Americans being eligible to fill any of the seven available captain positions. *Id.* at 7a-8a, 28a.

After the examinations were administered, the New Haven Civil Service Board (Board) held hearings to decide whether to certify a list of individuals eligible for promotion based on the exam results. Pet. App. 8a, 89a;

see *id.* at 465a-589a. Under the New Haven civil service rules, the Board had 60 working days, or until March 31, 2004, to decide whether to certify the list; if certified, the list would remain in effect for two years. *Id.* at 106a; C.A. App. 1080-1082. On March 18, 2004, the Board declined to certify the exam results by a 2-2 vote. Pet. App. 19a.

2. Petitioners, all of whom are white, and one of whom is also Hispanic, filed this suit against respondents, alleging, among other things, that they were denied promotions and opportunities for promotion on account of their race, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and the Equal Protection Clause of the Fourteenth Amendment. Pet. App. 6a, 22a. Respondents answered that the City decided not to certify the results based on a good-faith belief that using the examinations would have an unlawful disparate impact on African Americans and Hispanics, in violation of Title VII. *Id.* at 20a-21a, 939a-941a, 945a. On cross-motions for summary judgment, the district court ruled in favor of respondents on both the Title VII and equal protection claims. *Id.* at 5a-53a.

The district court rejected petitioners' claim that respondents' certification decision was pretextual because respondents had insufficient evidence that they would not have a defense to disparate-impact liability based on the job-relatedness of the examinations and the absence of other, less discriminatory selection measures. Pet. App. 29a-34a. The court explained that "it is not the case that defendants *must* certify a test where they cannot pinpoint its deficiency explaining its disparate impact * * * simply because they have not yet formulated a better selection method." *Id.* at 32a-34a.

The district court also dismissed the equal protection claim, holding that the decision not to certify the test results was not a "racial classification." Pet. App. 45a. In addition, the court found no evidence that respondents acted with "an intentionally discriminatory purpose" or "discriminatory animus" toward non-minorities. *Id.* at 47a.

3. The court of appeals affirmed in a per curiam opinion. Supp. Pet. App. 1a-3a. The court cited "the reasons stated in the thorough, thoughtful, and well-reasoned opinion of the court below," and further explained that, "because the Board, in refusing to validate the exams, was simply trying to fulfill its obligations under Title VII when confronted with test results that had a disproportionate racial impact, its actions were protected." *Id.* at 2a-3a.

The court of appeals denied rehearing en banc. Supp. Pet. App. 4a-36a. Judge Cabranes, joined by five other judges, dissented from the denial of rehearing en banc without expressing a view on the merits. *Id.* at 11a-30a.

SUMMARY OF ARGUMENT

I. A. An employer does not violate Title VII's disparate-treatment prohibition when it decides not to certify the results of a promotional test in order to comply with the statute's disparate-impact prohibition. Petitioners' contrary reading would needlessly pit Title VII's basic anti-discrimination provisions against one another and would defeat Congress's intent to encourage employers to comply voluntarily with Title VII. Nor is declining to certify test results the equivalent of "racial balancing" or imposing "quotas." *E.g.*, Pet. Br. 20, 61. In itself, such a decision reveals nothing about how promotions will ultimately be made or the race of the persons to be promoted.

B. Although an employer may seek to comply with Title VII's disparate-impact provision without engaging in unlawful disparate treatment, the employer's proffered legitimate, nondiscriminatory reason (such as Title VII compliance) for declining to certify test results may be a pretext for racial discrimination. *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802-805 (1973). A jury should be permitted to disbelieve an employer's proffered rationale of voluntary compliance when the employer's concern about Title VII liability was unreasonable. Because the burden of proof in a disparate-treatment case always falls on the plaintiff, evidence that the employer's actions were unreasonable would permit, but not require, the jury to find that the employer's rationale was a pretext for race discrimination. *St. Mary's Honor Ctr.* v. *Hicks*, 509 U.S. 502, 511 (1993).

C. This Court should decline to reach petitioners' contention that respondents' decision not to certify the test results violates 42 U.S.C. 2000e-2(*l*). No lower court decision has considered that issue, including the decisions below. But if the Court reaches petitioners' claim, it should reject it. A refusal to certify test results does not "adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race." *Ibid.*

II. A. A public employer's decision not to certify test results for the purpose of complying with Title VII is not subject to strict scrutiny under the Equal Protection Clause. Such a decision is facially neutral and, absent evidence of pretext, does not establish that the employer has acted with a discriminatory purpose. To be sure, when an employer acts to avoid using selection procedures that produce racially disparate effects, race is necessarily a factor in the employer's decision-making. But

this Court's precedents assume that facially neutral measures that are race-conscious are *preferable* to racial classifications; this Court has never intimated that they are subject to strict scrutiny. *E.g.*, *Parents Involved in Cmty. Sch.* v. *Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2792-2793 (2007) (Kennedy, J., concurring in part and concurring in judgment); *Adarand Constructors, Inc.* v. *Peña*, 515 U.S. 200, 237-238 (1995).

B. Even were this Court to apply strict scrutiny, compliance with Title VII's disparate-impact provision is a compelling governmental interest when a public employer has a strong basis in evidence that action is reasonably necessary to achieve compliance. Moreover, a decision declining to certify test results is narrowly tailored to further that compelling interest.

III. This Court should vacate the judgment below and remand for further consideration. The district court correctly concluded that a genuine intention to comply with Title VII's disparate-impact provisions does not constitute intentional racial discrimination, and that strict scrutiny does not apply to a facially neutral action taken in response to such concerns. Neither the district court nor the court of appeals, however, adequately considered whether, viewing the evidence in the light most favorable to petitioners, a genuine issue of material fact remained whether respondents' claimed purpose to comply with Title VII was a pretext for intentional racial discrimination in violation of Title VII or the Equal Protection Clause.

ARGUMENT

I. TITLE VII PERMITS EMPLOYERS TO DECLINE TO CERTIFY TEST RESULTS TO COMPLY WITH THE STATUTE'S DISPARATE-IMPACT PROVISION

A. This Case Requires The Reconciliation Of Title VII's Two Basic Anti-Discrimination Prohibitions

Title VII prohibits employment discrimination on the basis of race, color, religion, sex, or national origin. 42 U.S.C. 2000e-2(a). The statute proscribes both disparate-treatment and disparate-impact discrimination. 42 U.S.C. 2000e-2(a) and (k); *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971).

1. To succeed on a disparate-treatment claim, a plaintiff must show that the employer intentionally discriminated on the basis of a protected trait. *International Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 335 n.15 (1977). Under the burden-shifting framework of *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802-805 (1973), the plaintiff proves that an employment practice was intentionally discriminatory first by making a prima facie case sufficient to support an inference of discrimination.[1] The defendant rebuts that showing by offering a legitimate, non-discriminatory reason for the employment action. The plaintiff then has the burden of persuasion to show that the employer's proffered reason is merely pretextual, *i.e.*, that the employer's true reason is racially discriminatory. See *St. Mary's Honor Ctr.* v. *Hicks*, 509 U.S. 502, 506-508 (1993); *Texas Dep't of Cmty. Affairs* v. *Burdine*, 450 U.S. 248, 253-254 (1981).

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[1] "[I]f a plaintiff is able to produce direct evidence of discrimination, he may prevail" without satisfying the *McDonnell Douglas* standard. *Swierkiewicz* v. *Sorema N.A.*, 534 U.S. 506, 511 (2002).

2. To succeed on a disparate-impact claim, the plaintiff bears the burden of showing that an employment practice has a disparate impact on members of a protected class. 42 U.S.C. 2000e-2(k)(1)(A)(i). Such a showing establishes a prima facie violation of Title VII. *Ibid.*; *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 425 (1975). If that showing is made, the burden shifts to the employer to prove that the practice is "job related for the position in question and consistent with business necessity." 42 U.S.C. 2000e-2(k)(1)(A)(i). If the employer meets that burden, the plaintiff may still prevail by demonstrating that an alternative employment practice exists that has less disparate impact and serves the employer's legitimate needs, and that the employer refuses to adopt it. 42 U.S.C. 2000e-2(k)(1)(A)(ii) and (C).

To implement Title VII's disparate-impact provisions, four federal agencies have jointly adopted the Uniform Guidelines on Employee Selection Procedures. 43 Fed. Reg. 38,290 (1978); 28 C.F.R. 50.14 (Department of Justice); 29 C.F.R. Pt. 1607 (EEOC); 41 C.F.R. Pt. 60-3 (Department of Labor); 5 C.F.R. 300.103(c) (Office of Personnel Management). With certain exceptions, the Guidelines state that, if an employment examination or other selection procedure has an adverse impact, an employer's use of that procedure to hire or promote employees will be considered discriminatory unless the employer has conducted a "validity" study to establish the device's job-relatedness. 29 C.F.R. 1607.3(A), 1607.5, 1607.14. Under the "four fifths" rule of the Guidelines, "[a] selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agen-

cies as evidence of adverse impact." 29 C.F.R. 1607.4(D).

The Guidelines also state that an employer whose examination has an adverse impact should search for alternative selection devices with less adverse impact as part of the test-validation process. 29 C.F.R. 1607.3(B), 1607.15(B)(9), (C)(6) and (D)(8). Under the Guidelines, an employer whose examination has an adverse impact may forgo validation of the test if the employer adopts an alternative selection procedure without adverse impact. 29 C.F.R. 1607.6(A); 44 Fed. Reg. 12,001 (1979) (Q&A 31).

3. This case involves the intersection of Title VII's disparate-treatment and disparate-impact prohibitions. Petitioners allege that respondents engaged in disparate treatment when they refused to certify the results of promotional tests after those results revealed a disparate impact on minority firefighters. Petitioners argue that a "claimed interest in avoiding disparate-impact claims and liability is not a legitimate excuse for intentional discrimination," Br. 43, or alternatively, that the employer must have a "strong basis in evidence" before it can act to avoid the threat of disparate-impact liability, Br. 49. In a similar vein, petitioners argue that respondents' proffered reason was a pretext for discrimination because respondents lacked a strong basis in evidence for thinking that reliance on the test results would violate Title VII. Br. 48, 49.

B. Title VII Permits Employers To Take Reasonable Steps To Prevent Disparate-Impact Violations

1. An employer's purpose to comply with the disparate-impact prohibition does not constitute disparate treatment

Two features of Title VII should guide this Court to conclude that an intent to comply with Title VII's disparate-impact prohibitions does not equate with an intent to discriminate on the basis of race: (1) Congress's intent to prohibit *both* disparate-impact *and* disparate-treatment discrimination, and (2) Congress's preference for voluntary compliance by employers.

a. Title VII's ban on both disparate-treatment *and* disparate-impact discrimination reflects Congress's obvious desire that the provisions be read in harmony so that one provision does not defeat the other. See, *e.g.*, *United States* v. *Atlantic Research Corp.*, 127 S. Ct. 2331, 2336 (2007). In 1991, Congress codified the burden of proof in disparate-impact cases in a separate provision, thereby making unmistakably clear not only its intent to prohibit disparate-impact discrimination but also that a disparate impact *alone* violates Title VII unless the employer can prove job-relatedness and business necessity.

The disparate-impact provisions are triggered only when an employment practice has a disparate impact "because of * * * *race*" or "on the basis of *race*." 42 U.S.C. 2000e-2(a)(2) and (k)(1)(A)(i) (emphases added). Compliance with those provisions necessarily requires an employer to consider race (or certainly to be aware of race) when it examines its selection procedures to determine if they have any racially disparate impacts. Although petitioners assert that the City's race-coding the test-takers reflects race discrimination, Br. 10, 23,

26, 41, 46, there is nothing suspect about that practice under Title VII's disparate-impact provisions: Unless a test has been previously administered, it is difficult to see how an employer can know whether a test produces racially disparate impact without knowing the race of the test-takers.

In banning both disparate-treatment and disparate-impact discrimination, Congress saw no inherent tension between the two, but rather intended both provisions to work together "to prohibit all practices in whatever form which create inequality in employment due to discrimination." *Franks* v. *Bowman Transp. Co.*, 424 U.S. 747, 763 (1976). The structure of Title VII belies any claim that an employer's intent to comply with Title VII's disparate-impact provisions constitutes prohibited discrimination on the basis of race. "[B]y the enactment of title VII Congress did not intend to expose those who comply with the Act to charges that they are violating the very statute they are seeking to implement." 29 C.F.R. 1608.1(a).

A contrary conclusion would not only render the prohibitions at war with one another, but would misconstrue the meaning of an intent to discriminate "against any individual * * * because of" his or her race. 42 U.S.C. 2000e-2(a)(1). Under that provision, an employer that takes action in response to a disparate impact of an employment test among candidates generally does not thereby intend to discriminate against any individual non-minority candidate who did well on the test. Indeed, as explained, p. 27, *infra*, respondents' decision not to certify the test results adversely affected those African-American and Hispanic firefighters who did well on the tests, and benefited those white firefighters who did not pass.

Moreover, although petitioners' race, like that of minority firefighters, played a role in the employer's decision in the indirect sense that the disparate impact of the test on applicants as a general matter was taken into account, Title VII's disparate-impact prohibition necessarily requires employers to look at the impact of their procedures on persons of different races. The fact that an employer takes action in response to the racially disparate results of a test does not, however, mean that the employer's decision is based on the race of any particular candidate. Rather, where the employer acts in good faith in response to the disparate impact, the decision is based on the judgment that the tests themselves may have been racially discriminatory. Cf. *Hazen Paper Co.* v. *Biggins*, 507 U.S. 604 (1993) (decision based on pension status correlated with, but was not based on, age). An employer's concern that its test may violate Title VII thus does not equate with intentional discrimination. It is, rather, entirely consistent with Congress's core objective to *prevent* discrimination.[2]

b. Congress intended "voluntary compliance" to be the "preferred means of achieving the objectives of Title VII." *E.g.*, *Local No. 93, Int'l Ass'n of Firefighters* v. *City of Cleveland*, 478 U.S. 501, 515 (1986); *Albemarle*, 422 U.S. at 417-418. Congress's preference for voluntary compliance is founded upon sound policy considerations. Employers are better situated than courts to determine the best way to prevent discrimination in their work-

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[2] Section 703(j), 42 U.S.C. 2000e-2(j), is not to the contrary. Pet. Br. 44, 46. That provision states that Title VII does not *require* employers to grant racial preferences. *United Steelworkers of Am.* v. *Weber*, 443 U.S. 193, 204-207 (1979). Nothing in that provision supports the anomalous suggestion that Congress intended to prohibit employers from considering the racial impact of their employment selection procedures.

places, while simultaneously minimizing disruption to their operations and accommodating, to the greatest extent possible, the interests and expectations of employees. Accordingly, "persons subject to title VII must be allowed flexibility in modifying employment systems and practices to comport with the purposes of title VII." 29 C.F.R. 1608.1(c); *Johnson* v. *Transportation Agency*, 480 U.S. 616, 626, 630 n.8 (1987); *Local No. 93*, 478 U.S. at 519.

c. The foregoing principles support the conclusion that, far from intending to prohibit employers from attempting to comply with Title VII's disparate-impact provisions, Congress wanted to encourage employers to minimize the racially disparate effects of their employment procedures.

Petitioners urge this Court to hold that, under Title VII, employers must *never* think about the impact of their tests on racial minorities (Br. 45-47, 49), or at least may do so only *before* a test is given (Br. 41). *After* the test is given, petitioners insist, and even if employers *actually know* their tests had gross exclusionary effects on minorities, employers must ignore those effects (and hope not to be sued for disparate-impact discrimination) or amass proof of a disparate-impact case against themselves (Br. 49-57). That approach would seriously undermine Congress's objectives to spur employers to examine and correct their discriminatory practices and to resolve disputes before they end up in court.

In other Title VII cases, this Court has concluded that, in light of Congress's objective to prevent harm rather than redress it through litigation, "[i]t would * * * implement clear statutory policy and complement the Government's Title VII enforcement efforts to recognize the employer's affirmative obligation to

prevent violations and give credit * * * to employers who make reasonable efforts to discharge their duty." *Faragher* v. *City of Boca Raton*, 524 U.S. 775, 806 (1998). Similarly, the Guidelines advise employers that they are permitted to take "appropriate and lawful measures to eliminate adverse impact from selection procedures," even when doing so requires the employer to be conscious of race. 44 Fed. Reg. at 12,001 (Q&A 30). This Court should not lightly cast aside that long-standing guidance to private and public employers and the decades of experience by those employers in their good-faith efforts to comply.

Moreover, that this case involves no explicit racial classifications to make employment decisions counsels against overly restrictive requirements on employers that decline to certify test results that have severe racially disparate impacts.[3] Here, no one has been selected for promotion, much less selected based on his race. The record indicates neither how the City ultimately will make the promotion selections, nor the race of the firefighters who will ultimately be promoted, nor that the City would be precluded from certifying the very tests at issue upon further examination into their job-relatedness or alternatives. Pet. App. 301a-302a. Petitioners thus inaccurately state that this case is about "racial balancing" and "quotas." Br. 20, 30-32, 38, 39, 42, 44, 55, 60-61. And as discussed, pp. 10-13, *supra*, Con-

[3] Notably, this Court has upheld even explicit race- or gender-based classifications to remedy disparities in the workplace. *Johnson*, 480 U.S. at 626 (public agency's promotion of a woman over a more qualified male applicant under an affirmative-action plan to remedy the manifest imbalance at the agency constituted "a nondiscriminatory rationale for [the promotion] decision"); *Weber*, 443 U.S. at 209 (private employer's adoption of an affirmative-action plan was justified by a "manifest imbalance" in workforce).

gress certainly did not think that by prohibiting unjustified racially disparate effects, it was requiring "race-balancing" and "quotas."

2. An employer's refusal to certify test results does not violate Title VII when based on a reasonable belief that the test may violate Title VII

a. The issue before the Court is under what circumstances plaintiffs can prove a disparate-treatment case when the employer's proffered justification is that it acted to comply with Title VII's disparate-impact provisions. Title VII permits an employer to be motivated by compliance with Title VII, even though that intent necessarily means that the employer considered the racial impact of its employment tests. See pp. 11-12, *supra*. There is no basis, however, for concluding that Congress countenanced employers' acting out of sentiments of racial superiority or, conversely, stereotypes and prejudices. Such sentiments are entirely unrelated to any intent to comply with Title VII.[4]

Accordingly, the proper framework must serve to distinguish between, on the one hand, an employer's permissible—and, indeed, laudable—intent to correct the disparate racial impact of its employment practices and, on the other hand, an impermissible intent to discriminate on the basis of race. The *McDonnell Douglas* burden-shifting framework generally has guided courts in determining whether the plaintiff has sustained his burden of proving the employer was motivated by race.

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[4] Petitioners allege that Title VII prohibits "racial politics," and that those motives drove respondents' actions. Br. 30-31, 66. To be sure, racial politics based on prejudice or racial favoritism are impermissible. But a motive to avoid the political ramifications of Title VII liability for denying equal employment opportunity is not disparate treatment on the basis of race.

See p. 7, *supra*; cf. *Johnson*, 480 U.S. at 626 ("If [an affirmative-action plan] is articulated as the basis for the employer's decision, the burden shifts to the plaintiff to prove that the employer's justification is pretextual."). Accordingly, assuming supporting evidence in the record, a plaintiff should be entitled to prove that an employer's stated motive of compliance with Title VII is merely a pretext for intentional racial discrimination.

This Court has repeatedly cautioned, however, that the *McDonnell Douglas* framework, while a useful guide, was "never intended to be rigid, mechanized, or ritualistic." *St. Mary's Honor Ctr.*, 509 U.S. at 519 (quoting *USPS Bd. of Governors* v. *Aikens*, 460 U.S. 711, 715 (1983)). Cf. Pet. Br. 48-49. The *McDonnell Douglas* framework must accommodate Congress's judgment that an employer's intent to avoid disparate-impact liability is permissible (and indeed furthers the purposes of Title VII), even though the employer necessarily takes race into account in determining whether its employment test has a racially disparate impact.

This Court should reject petitioners' proposal that a jury must be permitted to find pretext unless the employer proves a full-blown disparate-impact case against itself. By imposing such a counterintuitive burden *on employers*, such a requirement would conflict with the rule that the burden of proof in a disparate-treatment case is *always* on the plaintiff-employee claiming discrimination. *St. Mary's Honor Ctr.*, 509 U.S. at 511. Moreover, that requirement, as well as petitioners' fallback "strong basis in evidence" test (Br. 49), would threaten to "immobilize or reduce the efforts of [employers] who would otherwise take action * * * without litigation, thus frustrating the Congressional intent to encourage voluntary action and increasing the prospect

of title VII litigation." 29 C.F.R. 1608.1; see *Kolstad* v. *American Dental Ass'n*, 527 U.S. 526, 545 (1999) ("Dissuading employers from [taking voluntary action] to prevent discrimination in the workplace is directly contrary to the purposes underlying Title VII.").[5]

This Court should accord substantial breathing room for employers to decide whether or not to certify test results when faced with results that establish a prima facie case of disparate-impact discrimination. Thus, when an employer advances compliance with Title VII as the reason for its actions—even though the employer necessarily was aware of the disparate racial impact of the selection procedure—the jury should be permitted to find pretext from those circumstances alone only when the plaintiff establishes that the employer's proffered motive of compliance is unreasonable. Of course, a jury is always permitted to find for a plaintiff based on other evidence that might demonstrate racial prejudice or constitute direct evidence that the employer's stated rationale is pretextual. But this Court has recognized the practical reality that most cases proceed based only on indirect evidence from which a jury is permitted (but not required) to find pretext when it discredits the employer's stated rationale. See, *e.g.*, *St. Mary's Honor Ctr.*, 509 U.S. at 511. Thus, in most cases a jury would be justified in disbelieving an employer's motive of voluntary compliance with Title VII only when that ratio-

[5] The EEOC's affirmative-action guidelines similarly state that an employer does not violate Title VII when it acts after having a "reasonable basis" to believe its selection procedures may have an adverse racial impact. 29 C.F.R. 1608.4(b)(1) and (3). This reasonable basis may exist without any admission or formal finding that the employer has violated Title VII. 29 C.F.R. 1608.4(b)(3); accord 29 C.F.R. 1608.1(c) (noting that such a "standard would undermine the legislative purpose of first encouraging voluntary action without litigation").

nale is unreasonable. In that circumstance, a jury would be entitled (but again not required) to find that the unreasonableness of the employer's actions demonstrates that the employer was using voluntary compliance as a pretext for race discrimination.

b. The reasonableness of an employer's motive will of course vary from case to case. For instance, an employer would be acting legitimately if it declined to certify employment test results based on a reasonable belief that, if the results were challenged, it may not meet its burden of showing that the test was job-related or that the challengers could show that alternatives to the test with a less discriminatory impact may exist.

Moreover, because a reasonableness standard must be flexible enough to encourage an employer to take affirmative steps to prevent a Title VII violation, an employer is not required to conduct a validity study before declining to certify test results. The Guidelines require an employer to undertake such efforts only if the employer actually wishes to select or promote persons on the basis of a test that has an adverse impact. 29 C.F.R. 1607.3.

An employer may be acting reasonably in not certifying test results even absent a validity study in a number of circumstances. The employer may wish to use an alternative selection criterion without an adverse impact. 29 C.F.R. 1607.3(A), 1607.6(A). Similarly, an employer may well be acting reasonably in temporarily suspending the selection process to investigate the possibilities of such alternatives. See Pet. App. 301a-302a. Requiring an employer to conduct a full-blown validity study whenever it declines to use a test based on its adverse impact would provide a significant disincentive for the employer to decline to use such a test, even where the employer

reasonably questions the job-relatedness of the test. Indeed, a validity study provides no sure defense to a disparate-impact lawsuit. *Albemarle*, 422 U.S. at 429-432 (rejecting validation study). An employer acts reasonably in not incurring those burdens when it has significant questions concerning a test's job-relatedness or reasonably believes that better alternatives to the test may exist.

Moreover, a high and unprecedented statistical disparity can justify a more informal consideration of possible test defects or alternative procedures, as would particular demands of state law (such as stringent and inflexible time limits for certification of tests). Conversely, an employer would not be acting reasonably for these purposes by relying on statistical disparity alone if other circumstances surrounding the test—such as existing validity studies and a known absence of alternatives—would establish the lawfulness of the test.

Inherent in the concept of reasonableness is that, in many situations, an employer would be acting reasonably either by using the test (and risking a disparate-impact lawsuit) or by declining to use the test. In all events, employers must be permitted to err on the side of compliance with Title VII.

C. An Employer's Decision Not To Certify Test Results Does Not Violate Section 703(*l*)

1. Section 703(*l*) of Title VII makes it an unlawful employment practice, in connection with the selection or referral of candidates for employment or promotion, "to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race, color, religion, sex, or national origin." 42 U.S.C. 2000e-2(*l*). Petitioners argue that respondents' decision not to certify the tests "alter[ed] the

results of" the tests because it "manipulate[d]" the test scores and results. Br. 63.

This Court should not address that contention. Petitioners did not argue that respondents violated Section 703(*l*) in their summary-judgment papers before the district court. And neither the district court nor the court of appeals addressed that claim. Pet. App. 39a n.9 ("While * * * Title VII * * * prohibits race-norming, none is alleged to have happened here."). We also are aware of no appellate decision that addresses whether a decision *not to use* a test violates Section 703(*l*), and petitioners cite none. It would not be appropriate for this Court to address the issue without the benefit of any lower-court decision. *NCAA* v. *Smith*, 525 U.S. 459, 470 (1999).

2. If this Court were to consider petitioners' contention, it should reject it. The decision not to use a test, standing alone, does not "alter the results" of the test. 42 U.S.C. 2000e-2(*l*). The term "alter" means "[t]o make a change in; to modify; to vary in some degree; to change some of the elements or ingredients or details without substituting an entirely new thing or destroying the identity of the thing affected. To change partially." *Black's Law Dictionary* 71 (5th ed. 1979); cf. *MCI Telecomms. Corp.* v. *AT&T*, 512 U.S. 218, 225 (1994) ("modify" "has a connotation of increment or limitation"). When an employer decides not to certify or otherwise use the results of a test, that conduct does not change or modify the results themselves.

The structure of Section 703(*l*) also indicates that the catch-all phrase "otherwise alter the results" does not speak to the situation when the employer decides not to use the test or its results. Indeed, Section 703(*l*) is entitled "Prohibition of discriminatory *use of test scores*." 42

U.S.C. 2000e-2(*l*) (emphasis added). And in the body of the provision, the preceding phrases "to adjust the scores" and "use different cutoff scores" both involve the discriminatory use of test scores. Under well-established principles of *ejusdem generis* and *noscitur a sociis*, the catch-all phrase "otherwise alter the results" similarly refers to situations in which an employer actually uses test results in making an employment decision. *E.g.*, *Brogan* v. *United States*, 522 U.S. 398, 403 n.2 (1998); *United States* v. *Williams*, 128 S. Ct. 1830, 1839 (2008).

3. The history and purpose of Section 703(*l*) further support the conclusion that the provision was intended to prevent employers from using tests for actual promotion or hiring decisions based on differential racial scoring criteria. Congress passed the provision in the 1991 amendments to Title VII to ban "race-norming" and similar practices used to alter scores or apply different scoring criteria based on race. 137 Cong. Rec. 29,045 (1991) (Sens. Danforth and Kennedy); *id.* at 30,661, 30,663 (Rep. Edwards); *id.* at 13,229-13,230 (Rep. Dornan); see, *e.g.*, *Dean* v. *City of Shreveport*, 438 F.3d 448, 463 (5th Cir. 2006); *Chicago Firefighters Local 2* v. *City of Chicago*, 249 F.3d 649, 655-656 (7th Cir.), cert. denied, 534 U.S. 995 (2001); *Bridgeport Guardians, Inc.* v. *City of Bridgeport*, 933 F.2d 1140, 1141, 1145-1146 (2d Cir.) (discussed in 137 Cong. Rec. at 29,038), cert. denied, 502 U.S. 924 (1991). An employer does not alter or manipulate test results when it decides not to use them. The history also reveals Congress's understanding that the provision "does not purport to affect how an employer * * * uses accurately reported test scores, or *to require that test scores be used at all.*" 137 Cong. Rec. at 29,047 (emphasis added); *id.* at 30,664 (same).

II. THE EQUAL PROTECTION CLAUSE DOES NOT FORBID PUBLIC EMPLOYERS FROM TAKING REASONABLE STEPS TO COMPLY WITH TITLE VII'S DISPARATE-IMPACT PROVISION

A. Absent Proof Of Intentional Racial Discrimination, The Equal Protection Clause Does Not Require Strict Scrutiny Of Facially Race-Neutral State Action Undertaken To Comply With Title VII

1. Allegations of racial discrimination in public employment implicate not only Title VII, but also the Equal Protection Clause of the Fourteenth Amendment, whose "central purpose" is "the prevention of official conduct discriminating on the basis of race." *Washington* v. *Davis*, 426 U.S. 229, 239 (1976).

In enforcing that constitutional guarantee, this Court has held that "all racial classifications imposed by government" must be strictly scrutinized "to 'smoke out' illegitimate uses of race." *Grutter* v. *Bollinger*, 539 U.S. 306, 326 (2003) (quoting *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 493 (1989)). The Court applies strict scrutiny by demanding that such classifications be "narrowly tailored to further compelling governmental interests." *Ibid.*

State action that is neutral on its face, however, is presumed to be valid; that presumption is overcome if the action is motivated by a racially discriminatory purpose. *Personnel Adm'r* v. *Feeney*, 442 U.S. 256, 272 (1979); *Village of Arlington Heights* v. *Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977). In this context, establishing discriminatory purpose requires more than proof that the governmental decisionmaker voluntarily undertook a challenged practice, or did so with awareness that the practice would have certain consequences for members of a particular racial group; it

rather requires proof that the decisionmaker "selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,'" those consequences. *Feeney*, 442 U.S. at 279.

2. Petitioners' equal protection challenge in this case does not concern an explicit racial classification, but an action neutral on its face: respondents' decision not to certify the results of promotional tests. This case is thus unlike many of the cases on which petitioner relies, which concern an employer's decision to respond to racial disparities in test results by making race an explicit factor in promotion decisions. See, *e.g.*, *Biondo* v. *City of Chicago*, 382 F.3d 680, 682-683 (7th Cir. 2004), cert. denied, 543 U.S. 1152 (2005); *Majeske* v. *City of Chicago*, 218 F.3d 816, 819 (7th Cir. 2000). In contrast to the practices at issue in those cases, a decision not to certify the results of a promotional test and instead to consider other methods of selecting candidates for promotion "neither says nor implies that persons are to be treated differently on account of their race." *Crawford* v. *Board of Educ.*, 458 U.S. 527, 537 (1982).

Petitioners contend (Br. 23-27) that respondents' decision is nevertheless subject to strict scrutiny under the Equal Protection Clause because the decision was "motivated by race, relying solely on racial-distribution information about the candidates, and with a starkly disparate racial harm," Br. 24, or, in the alternative, because the decision was "a pretext for [respondents'] desire * * * not to promote white firefighters precisely because they were white," Br. 25.

Of those arguments, only the last—if borne out by the evidence, see pp. 32-33, *infra*—would provide a basis for searching review. If respondents' decision were found to have been motivated by a purpose to advantage

or disadvantage individuals on the basis of their race, then the decision would be presumptively invalid and would require careful examination under the Equal Protection Clause. See, *e.g.*, *Arlington Heights*, 429 U.S. at 266-267, 270 n.21.

3. Absent a finding of pretext, however, respondents' facially neutral decision not to use the results of tests they believed to be unlawful does not trigger strict scrutiny. Petitioners' other arguments—that respondents' certification decision was in some sense race-conscious, relied on racial-distribution information about the candidates, and had a disparate racial effect—are not in themselves sufficient to establish that respondents' facially neutral decision was motivated by a discriminatory purpose, nor do they otherwise call for heightened review.

a. As explained, pp. 11-12, *supra*, when a public employer refuses to certify test results because of concerns that the test had an unlawful racially disparate impact on minority applicants, that does not mean that the employer has acted with a discriminatory purpose. Such a decision is certainly race-conscious in the limited sense that consideration of racially disparate effects necessarily requires consideration of the race of persons affected (and often, as petitioners emphasize, Br. 23, the use of "race-coded lists"). But such a decision, without more, does not establish that the employer was motivated by an intent either to favor minority applicants or to disfavor white applicants in the promotion process *because of* their race. Rather, such a decision establishes only that the employer intended to "remov[e] * * * unnecessary barriers to employment" that it believed to be racially discriminatory in operation. *Griggs*, 401 U.S. at 431. The desire to remove an unnecessary barrier to equal employment opportunity is not the equivalent of inten-

tional racial discrimination against those otherwise able to surmount it.

Nor has this Court held that strict scrutiny applies to facially race-neutral action merely because it can be said to have been race-conscious in the sense that it is designed to address racial issues. Cf. *Crawford*, 458 U.S. at 538 (noting the distinction between "state action that discriminates on the basis of race" and "state action that addresses, in neutral fashion, race-related matters"). This Court has instead repeatedly pointed to facially neutral measures as preferred means of achieving even avowedly race-conscious goals. See, *e.g.*, *Adarand Constructors, Inc.* v. *Peña*, 515 U.S. 200, 237-238 (1995); *Croson*, 488 U.S. at 509-510 (plurality opinion). Indeed, in determining whether an explicit racial classification is narrowly tailored under a strict-scrutiny analysis, this Court considers whether the governmental actor has considered the availability of race-neutral alternatives to accomplish the same race-conscious goal that it intended to achieve with the explicit classification. See *Grutter*, 539 U.S. at 339-340. The Court has never suggested that those facially race-neutral alternatives themselves must satisfy strict scrutiny.

In the education context, for example, a number of Members of this Court have expressed the view that facially race-neutral means of promoting racial integration or diverse student bodies are not subject to strict scrutiny. See, *e.g.*, *Parents Involved in Cmty. Sch.* v. *Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2792-2793 (2007) (Kennedy, J., concurring in part and concurring in judgment) (governmental actors "should be permitted to employ" certain "race-conscious" but "facially race-neutral" mechanisms "with confidence that a constitutional violation does not occur whenever a decisionmaker considers

the impact a given approach might have on students of different races"); *Gratz* v. *Bollinger*, 539 U.S. 244, 297-298 (2003) (Souter, J., joined by Ginsburg, J., dissenting) ("there is nothing unconstitutional" about "race conscious" university admission systems that guarantee admission to a fixed percentage of the top graduates from each high school); see also *Grutter*, 539 U.S. at 361-362 (Thomas, J., joined by Scalia, J., concurring in part and dissenting in part) (suggesting that certain facially race-neutral "admissions methods, such as accepting all students who meet minimum qualifications," are a permissible means of achieving "a racially aesthetic student body without the use of racial discrimination").

Public employers, like public educational institutions, are entitled to "consider[] the impact a given approach might have on [individuals] of different races," *Parents Involved*, 127 S. Ct. at 2792 (Kennedy, J., concurring in part and concurring in the judgment), and to take race-neutral steps to avoid making employment decisions that have a discriminatory racial impact.

b. Nor does the fact that the decision not to certify the results of the 2003 exams may have had "disparate racial harm," Pet. Br. 24, warrant application of strict scrutiny. As petitioners themselves acknowledge, "the Equal Protection Clause forbids only intentional racial discrimination in governmental employment, not mere disparate impacts." *Id.* at 29 (citing *Davis*, 426 U.S. at 242).

In certain, "rare" cases, a "stark" pattern of racially disparate effects, standing alone, may support a finding of a racially discriminatory motive, but ordinarily "impact alone is not determinative." *Arlington Heights*, 429 U.S. at 266 (citing, inter alia, *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886), and *Gomillion* v. *Lightfoot*, 364 U.S. 339

(1960)). This case involves no such stark pattern. As an initial matter, it is not clear that respondents' decision, in itself, had *any* necessary effect, other than delay, since no applicants, including petitioners, have yet been refused promotions altogether as a result of the respondents' decision. See p. 14, *supra*.

In any event, to the extent that respondents' decision constituted a definitive determination not to make promotions on the basis of the 2003 examinations, the effects of that decision, standing alone, likewise are insufficient to establish intentional racial discrimination. The decision, moreover, burdened not only white firefighters, but also two Hispanic firefighters who would have been immediately eligible for promotion had the test results been certified, see Pet. Br. 26, and other minority firefighters who would have been eligible for promotion during the two-year life cycle of the results, see *id.* at 26 n.11. Conversely, the decision benefited those white firefighters who failed the tests and may well fare better if another test is administered. See Pet. App. 429a-436a.

B. Even If Subject To Strict Scrutiny, An Employer's Decision Not To Certify Test Results Is Constitutional If There Is A Strong Basis In Evidence For Believing That The Decision Was Reasonably Necessary To Comply With Title VII

Absent proof of intentional discrimination, a public employer's facially neutral decision not to employ the results of a promotional test because of Title VII disparate-impact concerns does not merit the same degree of searching review as, for example, a decision to give special consideration to minority candidates because of their race. But even if the same standard of review did apply, such a decision may nevertheless be upheld as constitutional. Strict scrutiny is a demanding standard,

but this Court has repeatedly rejected the notion that it is "strict in theory, but fatal in fact." *Grutter*, 539 U.S. at 326 (quoting *Adarand*, 515 U.S. at 237).

1. Compliance with Title VII, including its disparate-impact provisions, is undoubtedly a compelling governmental interest. Although, as petitioner notes (Br. 28), this Court has not squarely held that state actors have a compelling interest in avoiding practices with disparate racial effects, the Court has consistently *assumed* it in the analogous context of the so-called "results test" of Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973(a), see, *e.g.*, *Bush* v. *Vera*, 517 U.S. 952, 977 (1996) (plurality opinion), and a number of Justices have clearly endorsed the proposition, *id.* at 990, 992, 994 (O'Connor, J., concurring); *id.* at 1033-1034 (Stevens, J., dissenting); see also *id.* at 1065 (Souter, J., dissenting).

In evaluating governmental interests in avoiding disparate results in voting cases, the Court has applied the same standard it has applied to efforts to remedy past intentional discrimination: The government must have a "strong basis in evidence" for concluding that predominantly race-based action, such as creating majority-minority districts in a manner inconsistent with traditional districting principles, is "reasonably necessary" to comply with the Voting Rights Act. *Vera*, 517 U.S. at 977 (citation omitted); see, *e.g.*, *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986). Notably, however, the Court does not require state actors to *prove* the existence of a violation to justify taking action to avoid or remedy it; such a rule would "severely undermine" incentives to comply with the civil rights laws. *Id.* at 290 (O'Connor, J., concurring in part and concurring in judgment). Thus, if strict scrutiny applies in this context—despite the race-neutral nature of the action—an em-

ployer has a constitutionally sufficient interest in declining to use the results of a test when it has a strong basis in evidence for believing that the decision is reasonably necessary to comply with Title VII.

2. To the extent that petitioners (Br. 28, 33) invite the Court to hold that a purpose to comply with Title VII's disparate-impact provisions can *never* be a compelling interest, no matter how well-founded the Title VII concern, the Court should decline.

As a preliminary matter, if petitioners intended in their lower-court briefs to suggest that *any* effort voluntarily to comply with Title VII's disparate-impact provisions necessarily violates the Equal Protection Clause, they did not make that intent plain in their district court papers. See Pet. Rev. Summ. J. Mem. 68. Additionally, neither lower court addressed the question. This Court ordinarily does not review arguments that were not passed on below, see, *e.g.*, *Singleton* v. *Wulff*, 428 U.S. 106, 120 (1976), and the Court should be particularly hesitant to depart from that practice here. Petitioners' contention is one that strikes at the heart of a legal regime that is founded on this Court's decision in *Griggs*, and that has, over the ensuing decades, become an essential component of the way both employers and employees understand their duties and rights in the workplace. To the extent the Court might otherwise be inclined to believe the issue warrants review, despite that long-settled practice, it should, at a minimum, wait for a case in which the issue has been fully ventilated in the lower courts.

In any event, petitioners' argument (Br. 28) appears to rest primarily on their citation of *Wygant*, in which the Court held that an interest in remedying "[s]ocietal discrimination" is too "amorphous a basis for imposing

a racially classified remedy." 476 U.S. at 276 (plurality opinion). *Wygant* is, however, inapposite, since this case does not concern an asserted interest in remedying "societal discrimination," but an employer's interest in avoiding liability for its own use of a test that has racially discriminatory effects. As noted above, the Court has consistently assumed that similar interests are, in fact, compelling. This case, moreover, does not involve a "racially classified remedy," *ibid.*, but rather concerns facially neutral measures.

Petitioners also argue (Br. 29-33) that permitting employers to rely solely on a "stated, unfounded, 'good faith' fear of Title VII suits" to justify racial classifications could lead to "racial balancing," "crude racial politics," and "de facto quotas." The answer to petitioners' concern about permitting employers to rely on "unfounded" fears of Title VII suits is, of course, to require that the fear be sufficiently founded in evidence (if strict scrutiny applies), and that employers' responses be narrowly tailored. The answer is not categorically to bar employers from voluntarily complying with Title VII's disparate-impact provisions, no matter how well-founded their fear of liability.

3. Under a strict-scrutiny analysis, if a public employer's interest in avoiding a Title VII disparate-impact violation is sufficiently well-founded, that interest justifies declining to make promotions based on tests with racially disparate impacts.

"The purpose of the narrow tailoring requirement is to ensure that the means chosen fit th[e] compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype." *Grutter*, 539 U.S. at 333 (brackets in original) (internal quotation marks omitted). In un-

dertaking the narrow-tailoring inquiry, this Court may consider, among other factors: the necessity for the relief and the efficacy of race-neutral alternative remedies; the flexibility and duration of the relief; and the impact of the relief on the rights of third parties. See *United States* v. *Paradise*, 480 U.S. 149, 171 (1987) (plurality opinion); *id.* at 187 (Powell, J., concurring).

If respondents' decision not to certify exam results is found to have been based on a well-founded concern about Title VII disparate-impact liability, there can be little question that it was also narrowly tailored to address that concern. As previously noted, the decision is itself facially neutral. The effects of the decision are necessarily limited in duration, since the City has a continuing need to fill vacancies. Finally, the decision not to certify test results does "not unduly harm members of any racial group." *Grutter*, 539 U.S. at 341. To be sure, those candidates who performed well on the exams may legitimately be disappointed and frustrated. Pet. App. 42a n.11. But that disappointment is not in itself the sort of "unacceptable burden" on innocent persons, *Paradise*, 480 U.S. at 182 (plurality opinion), that must frustrate the accomplishment of compelling interests as a constitutional matter.

Petitioners contend (Br. 40-41) that respondents' action cannot be a narrowly tailored response to their concern that the tests were unlawfully discriminatory under Title VII, because the tests were "carefully designed to mitigate anticipated adverse impact," and because the City could have taken other steps before administering the tests, such as "provid[ing] tutoring programs and encourag[ing] minorities with leadership potential to participate," to "further reduce any anticipated disparity." Petitioners' contention misses the point that

even a test "carefully designed to mitigate anticipated adverse impact" may nevertheless prove, after administration, to have an adverse impact that violates Title VII. For an employer who discovers, after the fact, that it may have administered such a test, petitioners' preferred before-the-fact courses of action are no longer relevant options.

III. THIS COURT SHOULD VACATE THE JUDGMENT BELOW AND REMAND FOR FURTHER CONSIDERATION

The district court rejected petitioners' Title VII disparate-treatment claim on the ground that a motivation to avoid making promotion decisions based on tests with an adverse racial impact "does not, as a matter of law, constitute discriminatory intent." Pet. App. 43a. It rejected petitioners' equal protection claim for similar reasons, concluding respondents' decision did not result in any explicit racial classification and was not motivated by racial animus. *Id.* at 47a.

The district court correctly concluded that a genuine intention to comply with Title VII's disparate-impact provisions does not constitute intentional racial discrimination, and that the Equal Protection Clause does not bar facially neutral action taken in response to such concerns. The court did not, however, adequately consider whether, viewing the evidence in the light most favorable to petitioners, a genuine issue of material fact remained on petitioners' disparate-treatment claim, including whether respondents' claimed concern about Title VII liability was a pretext for intentional racial discrimination. Although the district court cited evidence before the Board that could raise legitimate concerns about the severity of the disparate impact, the validity of the test, and the possible availability of alter-

natives, see Pet. App. 9a-19a, 27a-28a, 32a-34a, the district court's opinion could be read to suggest that a disparate impact alone is always sufficient, see *id.* at 37a-39a, 40a n.10, 43a, 47a; the court did not in any event consider whether respondents' Title VII concerns were reasonable; and the court cited possible reasons for respondents' actions other than complying with Title VII, *id.* at 47a. Similarly, the court of appeals stated that respondents' decision was "protected" because "the Board was simply trying to fulfill its obligations under Title VII," without addressing the question of pretext. Supp. Pet. App. 3a.

This Court on its own could review the record in this case to see if summary judgment was appropriate under the standards set forth in this brief. The Court's usual practice, however, is to remand to the lower courts to apply the appropriate standard as announced by this Court. See, *e.g.*, *Allison Engine Co.* v. *United States ex rel. Sanders*, 128 S. Ct. 2123, 2131 (2008); *Sprint/United Mgmt. Co.* v. *Mendelsohn*, 128 S. Ct. 1140, 1147 (2008). Particularly in light of the voluminous record in this case, it would be appropriate for this Court to remand for consideration of whether respondents' claimed Title VII concerns were a pretext for intentional racial discrimination.[6]

For similar reasons, a remand would also be appropriate on respondents' equal protection claim. That would be so even if the Court were to accept petitioners' submission that strict scrutiny applies to a facially neutral decision not to use test results because of Title VII

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[6] Notably, even before this Court, petitioners' allegations have alternated between racial and nonracial reasons for respondents' action. See 07-1428 Pet. 13 (claiming that respondents were actually motivated by nepotism, not race).

disparate-impact concerns, regardless of whether the employer intended to discriminate against any particular applicant because of his race. The lower courts did not address that issue at all.

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded for further proceedings consistent with the position set forth in this brief.

Respectfully submitted.

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FEBRUARY 2009

Nos. 07-1428 and 08-328

Supreme Court, U.S.
FILED
MAR 25 2009
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

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v.
JOHN DESTEFANO ET AL., *Respondents*.

FRANK RICCI ET AL., *Petitioners*,
v.
JOHN DESTEFANO ET AL., *Respondents*.

On a Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, AND LATINOJUSTICE PRLDEF AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

This brief will address the following questions:

1. Whether a public entity violates the Equal Protection Clause by abandoning a practice it has a strong basis in evidence to believe would violate Title VII.

2. Whether Title VII's proscription against business practices with an unjustified disparate impact is unconstitutional on the ground that it requires public employers to violate the Equal Protection rights of employees who benefit from the practices forbidden by the Act.

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INTEREST OF *AMICI CURIAE*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit and nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. In particular, the ACLU has appeared before this Court in numerous cases involving the interpretation of Title VII and the scope of the Equal Protection Clause, both as direct counsel and as amicus curiae.

The Mexican American Legal Defense and Educational Fund (MALDEF) is a national civil rights organization established in 1968. Its principal objective is to promote the civil rights of Latinos living in the United States through litigation, advocacy and education. MALDEF's mission includes a commitment to ensure equal employment opportunities for Latinos. MALDEF has represented Latino and minority interests in civil rights cases in federal courts throughout the nation. During its 40-year history, MALDEF has litigated numerous employment discrimination cases on behalf of Latino employees.

LatinoJustice PRLDEF is an independent national nonprofit civil rights organization which has

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[1] Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part, and that no person other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. Petitioners and respondents have filed letters of consent with the Clerk of the Court.

advocated for and defended the constitutional rights and the equal protection of all Latinos under law. Founded in 1972, the organization's mission is to promote the civic participation of the pan-Latino community, to cultivate Latino community leaders, and to bring impact litigation addressing voting rights, employment opportunity, fair housing, language rights, educational access, immigrants' and migrants' rights. During its 37-year history, LatinoJustice PRLDEF has litigated numerous employment discrimination cases on behalf of Latino and Latina employees.

SUMMARY OF ARGUMENT

In some ways, this case appears to present a narrow question regarding the application of Title VII and the Equal Protection Clause to a particular employment practice by one public employer in the State of Connecticut. However, the arguments petitioners make in favor of their position raise broader issues of surpassing significance. In fact, if accepted, petitioners' constitutional arguments would draw into question the constitutionality of Title VII's disparate impact provision, and perhaps require its invalidation as applied to public employers—if not here, then in a subsequent case.

In particular, petitioners assert that an employer violates the Equal Protection Clause if it abandons an employment practice because it fears the practice causes an unjustified disparate impact on minorities. Although petitioners are careful not to say so directly, the natural consequence of such reasoning is the conclusion that by requiring such action, Title VII's disparate impact provision is itself incompatible

with the Equal Protection Clause, at least in cases involving public employment.

For this Court to strike down, or even call into question, Title VII's disparate impact provision would be a momentous decision, with grave consequences for the nation's continuing efforts to ensure equal access to employment opportunities. Consistent with traditional principles of constitutional avoidance, however, the Court can and should resolve petitioners' constitutional claims on narrower grounds. Specifically, the Court should hold that respondents' efforts to comply with Title VII would survive even the strictest level of Equal Protection scrutiny.

This Court has assumed in the past that compliance with a presumptively valid federal statute is a compelling state interest. Because petitioners do not openly challenge Title VII's validity, this Court should assume that acting to comply with its mandates similarly constitutes a compelling state interest. And because respondents had a strong basis in evidence to believe that their actions were necessary to comply with Title VII's disparate impact provision, the Court should hold that their actions were narrowly tailored to serve that compelling interest.

But to the extent that the Court ventures into uncharted constitutional waters, it should confirm that neither Title VII, nor public employers' efforts to comply with it, violate the constitutional rights of employees who benefit from practices that have a disparate impact on protected classes of workers. Such action is not tantamount to intentional race discrimination against the beneficiaries of the

discriminatory practice. And to the extent it is even considered race conscious to a degree, it is the kind of race-conscious conduct that this Court has suggested—and, if necessary in this case, should now hold—does not warrant strict scrutiny.

ARGUMENT

I. Petitioners' Constitutional Arguments, If Accepted, Would Call Into Question The Constitutionality Of Title VII's Disparate Impact Provision As Applied To Public Employers.

Although petitioners do not directly ask this Court to declare Title VII's disparate impact provision unconstitutional as applied to public employers, that conclusion is the fair implication of their constitutional arguments in this case.

Even though petitioners allege that respondents' conduct violated both Title VII and the Constitution, they ignore traditional constitutional avoidance principles and assert first and foremost that respondents' attempt to comply with Title VII violates the Equal Protection Clause, on grounds that imply Title VII's unconstitutionality. *See* Petr. Br. 21-43. First, they assert that in acting to avoid a disparate impact on minorities, a public employer engages in "race-based action," akin to intentional discrimination, which is "subject to strict scrutiny." *Id.* at 23. Next, they argue that "avoiding disparate-impact liability can never be a compelling state interest that could justify intentional racial discrimination," *id.* at 33, even if required by Title VII, *id.* at 29 ("[A]voiding Title VII disparate-impact

claims cannot justify intentional race-based disparate treatment."). As a consequence, petitioners argue, New Haven violated the Equal Protection Clause, even if it was simply attempting in good faith to comply with Title VII's disparate impact requirements. *See id.* at 29-33.

A seemingly necessary consequence of accepting this line of argument is that Title VII's disparate impact provision violates the Equal Protection Clause as applied to public employers. If avoiding disparate impact is unconstitutional discriminatory state action, then Title VII may not require public employers to engage in it. Although Congress has broad powers under the Commerce Clause and Section 5 of the Fourteenth Amendment, it must exercise those powers consistent with the other commands of the Constitution. *See, e.g., Ex parte Commonwealth of Virginia*, 100 U.S. 339, 345-46 (1879) (Congress's power to enforce the Fourteenth Amendment includes power to enact "[w]hatever legislation is appropriate . . . *if not prohibited*" by the Constitution) (emphasis added); *United States v. Darby*, 312 U.S. 100, 115-16 (1941) (same for Commerce Clause).

II. Title VII's Proscription Against Practices With An Unjustified Disparate Impact Plays A Central Role In Enforcing The Nation's Commitment To Equal Employment Opportunity.

This Court does not lightly call into question the constitutionality of any act of Congress. *See, e.g., Jean v. Nelson*, 472 U.S. 846, 854 (1985). The Court should be especially hesitant to question the

constitutionality of Title VII's disparate impact provision, which has long served a critical function as an essential part of one of the nation's most important civil rights laws.

1. Congress enacted Title VII as part of the Civil Rights Act of 1964 in light of overwhelming evidence of pervasive inequality in the American job market, inequality that grew out of generations of resistance to opening the nation's economic opportunities to all citizens, regardless of race, religion, color, or sex. *See, e.g.*, *United Steelworkers of America, AFL-CIO-CLC v. Weber*, 443 U.S. 193, 202 (1979) (discussing legislative history); Robert H. Olson, Jr., *Employment Discrimination Litigation: New Priorities in the Struggle for Black Equality*, 6 HARV. C.R.-C.L. L. REV. 20, 22-29 (1970).

Congress recognized that dismantling the racially stratified employment market was a critical step to achieving broader economic and social equality. In a society with a market economy, in which many fundamental opportunities—including the ability to attend college, receive medical care, buy a house, start a business, and run for political office—depend in no small measure on wealth and income, equal access to well-paying jobs was a necessary first step to eradicating the continuing legacy of discrimination condoned and even sponsored by the government over generations. *See, e.g.*, *Weber*, 443 U.S. at 202-03; 110 CONG. REC. 6, 7204, 7379 (1964).

To achieve this purpose, Congress proscribed both practices proven to be intentionally discriminatory and those that were "fair in form, but discriminatory in operation." *Griggs v. Duke Power*

Co., 401 U.S. 424, 431 (1971). Congress and this Court recognized that some employment practices and tests, "however neutral on their face, operated to exclude many blacks who were capable of performing effectively in the desired positions." *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 806 (1973). Regardless of whether the barriers were intentional, Congress concluded that they must be removed to ensure that the promise of equal employment opportunity was not simply a slogan, but in fact became reality.

At the same time, Congress did not intend Title VII to require "that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group." *Griggs*, 401 U.S. at 430-31. Instead, Congress in Title VII required only the removal of "*artificial, arbitrary, and unnecessary* barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification[s]." *Id.* at 431 (emphasis added). Accordingly, Title VII's disparate impact test has developed in the Court's cases, and eventually was codified by Congress, in a way that balances employers' interest in ensuring a highly qualified workforce and the national interest in promoting equal employment opportunity.

Thus, to make a prima facie claim of unlawful racially disparate impact, a plaintiff must demonstrate that the employer "uses a particular employment practice that causes a disparate impact on the basis of race." 42 U.S.C. § 2000e-2(k)(1)(A)(i). When this showing is made, the burden then shifts to the defendant, who must justify the disparate result

by "demonstrat[ing] that the challenged practice is job related for the position in question and consistent with business necessity." *Id.* The plaintiff may overcome that showing by demonstrating that the proffered business justification is pretextual. *Id.*; *see also Connecticut v. Teal*, 457 U.S. 440, 446-47 (1982). Pretext can be inferred when a plaintiff identifies an equally effective alternative practice with a lesser disparate impact that the employer refuses to adopt. *See* 42 U.S.C. §§ 2000e-2(k)(1)(A)(ii), (C); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 436 (1975).

2. The disparate impact cause of action thus described serves an essential role in fulfilling the promise of equal employment opportunity.

a. First, the theory acts as a prophylactic measure to ensure that discrimination founded in unspoken racial bias does not escape detection and remedy. "There will seldom be 'eyewitness' testimony to the employer's mental processes." *U.S. Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983). As a result, "[f]requently the most probative evidence of intent will be objective evidence of what actually happened." *Washington v. Davis*, 426 U.S. 229, 253 (1976) (Stevens, J., concurring). Disparate impact analysis serves to identify a class of practices that may have their genesis in intentional discrimination, yet would escape remedy if the employer's intent had to be proven. Indeed, this Court has recognized that the disparate effect of an employment practice is probative evidence of discriminatory intent. *See, e.g., Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339-40 & n.20 (1977).

That inference of intentional discrimination is strengthened if the employer cannot show that the practice serves, in a significant way, a legitimate business purposes. *See In re: Employment Discrimination Litigation Against State of Ala.*, 198 F.3d 1305, 1321-22 (11th Cir. 1999). Moreover, even when a practice serves a legitimate purpose, the employer's refusal to adopt an equally effective but less discriminatory alternative "would belie a claim by [the employer] that [its] incumbent practices are being employed for nondiscriminatory reasons," *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 660-61 (1989), and provide "evidence that the employer was using its tests merely as a 'pretext' for discrimination," *Albemarle Paper*, 422 U.S. at 425.[2]

To be sure, not every practice with an unlawful disparate impact is actually motivated by intentional race discrimination. But Congress could reasonably conclude that the prophylactic aspect of the test was necessary to ensure fully effective enforcement of the basic prohibition against intentional discrimination. *See Tennessee v. Lane*, 541 U.S. 509, 520 (2004).

b. Disparate impact analysis further promotes the goal of equal economic opportunity by removing unnecessary barriers to employment and advancement, some of which risk "freez[ing] the

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[2] In addition, "even if one assumed that [conscious intentional discrimination] can be adequately policed through disparate treatment analysis, the problem of subconscious stereotypes and prejudices would remain." *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 990 (1988).

status quo of prior discriminatory employment practices." *Griggs*, 401 U.S. at 430.

Even when employers do not intend to restrict employment opportunities for women and minorities, they may sometimes use—for no good reason—practices which have that effect. *See, e.g., Dothard v. Rawlinson*, 433 U.S. 321 (1977) (prison imposed height and weight requirements for guards, which excluded most women, instead of directly measuring strength or other characteristics relevant to the job). The removal of such barriers not only benefits those unnecessarily excluded, but often the employer and the national economy as well. *See, e.g.*, REPORT OF THE INDEPENDENT COMMISSION OF THE LOS ANGELES POLICE DEPARTMENT 83 (1991) (noting that bias against female police officers "depriv[ed] the Department of specific skills, and thereby contribut[ed] to the problem of excessive force").

At the same time, this process instills greater community confidence in the fairness of public employment practices, and as a consequence, the legitimacy of the government itself. *See Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 290 (1986) (O'Connor, J., concurring); *cf. also Grutter v. Bollinger*, 539 U.S. 306, 332 (2003) ("In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity.").

III. This Court Can And Should Resolve This Case Without Questioning The Constitutionality Of Title VII's Disparate Impact Provision.

This Court has repeatedly endorsed Title VII's disparate impact analysis, without ever questioning its constitutionality. *See, e.g., Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989); *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). There is no reason to do so for the first time here. Instead, this Court can, and should, resolve petitioners' Equal Protection challenge on narrow grounds by holding that respondents' conduct survives even the strictest level of Equal Protection scrutiny. *A fortiori*, respondents' conduct necessarily survives the lower level of scrutiny that respondents persuasively argue should apply here.[3]

A. Compliance With Title VII Is A Compelling State Interest.

In order to satisfy strict scrutiny, a public employer must show that the action taken was "narrowly tailored" to achieve a "compelling government interest." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995). Contrary to petitioners' suggestion (Petr. Br. 28), this Court has repeatedly assumed that compliance with presumptively valid federal antidiscrimination law is

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[3] As discussed in Section IV of this brief, *amici* agree with respondents that strict scrutiny does *not* apply either to Title VII or to respondents' efforts to comply with it.

a compelling state interest.[4] That assumption is well-founded and should be applied in this case as well.

1. Under the Supremacy Clause, no state has the right "to disregard the Constitution or valid federal law." *Alden v. Maine*, 527 U.S. 706, 754-55 (1999). And because acts of Congress are presumed to be constitutional, *Fairbank v. United States*, 181 U.S. 283, 285 (1901), public employers may act to comply with federal civil rights laws unless and until a court declares them unconstitutional. As several members of this Court have recognized, "it would be irresponsible for a State to disregard" a presumptively valid federal law. *Bush v. Vera*, 517 U.S. 952, 990-92 (1996) (O'Connor, J., concurring); *see also League of United Latin American Citizens v. Perry*, 126 S. Ct. 2594, 2668 (2006) (Scalia, J., concurring in the judgment in part and dissenting in part) (concluding that a State should not be "placed in the impossible position of having to choose between compliance with [federal law] and compliance with the Equal Protection Clause").

There is no reason to apply a different presumption here. Petitioners do not, and cannot, question that Title VII constitutes a valid exercise of Congress's power under the Commerce Clause, as

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[4] *See, e.g.*, *Bush v. Vera*, 517 U.S. 952, 977 (1996); *Shaw v. Hunt*, 517 U.S. 899, 915 (1996); *Shaw v. Reno*, 509 U.S. 630, 656 (1993). Moreover, as respondents demonstrate (Resp. Br. 52-53), a majority of the members of this Court have affirmatively embraced the proposition that compliance with the Voting Rights Act constitutes a compelling state interest.

applied to both private and public employers. *See EEOC v. Wyoming*, 460 U.S. 226 (1983) (Age Discrimination in Employment Act as applied to public employers held to be constitutional exercise of Commerce Clause authority). Likewise, this Court has never questioned that Title VII's application to public employers constitutes a valid exercise of Congress's power to enforce the Fourteenth Amendment.[5] *See, e.g., Connecticut v. Teal*, 457 U.S. 440 (1982); *New York City Transit Auth. v. Beazer*, 440 U.S. 568 (1979); *Dothard v. Rawlinson*, 433 U.S. 321 (1977); *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976).[6]

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[5] Whether Title VII's disparate impact provision constitutes appropriate legislation to enforce the Fourteenth Amendment is a question of no ultimate consequence in this case. As noted above, the provision is indisputably proper Commerce Clause legislation. Whether it is also valid Fourteenth Amendment legislation is relevant only with respect to the validity of Title VII's abrogation of State sovereign immunity. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976); *Kimel v. Florida Board of Regents*, 528 U.S. 62, 80 (2000). But that question does not arise in this case because respondent, as a municipal employer, enjoys no such sovereign immunity. *Monell v. New York City Dep't of Soc. Srvcs.*, 436 U.S. 658 (1978).

[6] The Court in *Fitzpatrick* upheld Congress's abrogation of state sovereign immunity to Title VII claims as a valid exercise of its enforcement powers under the Fourteenth Amendment. 427 U.S. at 456; *see also Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 729-30 (2003) ("[H]ere, as in *Fitzpatrick*, the persistence of such unconstitutional discrimination by the States justifies Congress' passage of prophylactic § 5 legislation."); *City of Rome v. United States*, 446 U.S. 156, 179 (1980) (reading *Fitzpatrick* as holding that the extension of Title VII to public employers "was an appropriate method of enforcing the Fourteenth Amendment").

The fact that Title VII prohibits disparate impact as well as disparate treatment does not undermine that conclusion. "When Congress seeks to remedy or prevent unconstitutional discrimination, § 5 authorizes it to enact prophylactic legislation proscribing practices that are discriminatory in effect, if not in intent, to carry out the basic objectives of the Equal Protection Clause." *Tennessee v. Lane*, 541 U.S. 509, 520 (2004); *see also Hibbs*, 538 U.S. at 737-38.

To be sure, as noted above, petitioners suggest that Title VII's disparate impact provision impermissibly trenches upon the Equal Protection rights of white workers who benefit from the forbidden disparate impact. Petr. Br. 23, 28, 33. But such innuendo is insufficient to call into question the constitutionality of an Act of Congress. Accordingly, this Court should proceed on its ordinary presumption that acts of Congress are assumed constitutional and that compliance with such laws is a compelling governmental interest.

B. Abandoning An Employment Test With A Prima Facie Disparate Impact Is A Narrowly Tailored Means To Achieving An Employer's Compelling Interest In Compliance With Title VII.

A public employer's action is narrowly tailored to serve its compelling interest of complying with Title VII if the action is "reasonably necessary" to comply with the statute. *See Vera*, 517 U.S. at 977; *Miller v. Johnson*, 515 U.S. 900, 921 (1995). An action is reasonably necessary if the employer has a "strong basis in evidence" for concluding that implementing

the employment practice would violate Title VII. *See, e.g.*, *Vera*, 517 U.S. at 977. In the context of avoiding disparate impact, a public employer has a strong basis in evidence when the results of an employment practice would be sufficient to establish a prima facie case of disparate impact discrimination. Requiring a greater showing is unnecessary to protect the rights of non-minority employees, would unduly burden public employers, and could discourage voluntary compliance with Title VII.

1. In the contexts of voting and affirmative action, this Court has held that the State acts in accordance with its compelling interest in complying with federal law if it has a "strong basis in evidence for concluding that" its actions were "reasonably necessary to comply" with federal law, *Vera*, 517 U.S. at 977 (voting); *see also Shaw v. Hunt*, 517 U.S. 899, 908 n.4 (1996) (voting), or to remedy past discrimination, *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986) (affirmative action). The same basic standard should apply here as well.

The drafters of the Constitution understood that for governments to function, they must have some leeway to operate without the perpetual risk of being subject to litigation and judicial supervision regardless of what they do. Accordingly, strict scrutiny does not compel a public entity to ignore the disparate impact of its employment practices unless and until it is absolutely clear that action is necessary to avoid violating federal law. *See, e.g.*, *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 519 (1989) (Kennedy, J., concurring) (noting that "it diminishes the constitutional responsibilities of the

political branches to say that they must wait to act until ordered to do so by a court").

Thus, in the First Amendment context, the Court has recognized the need to construe states' obligations under the competing demands of the Establishment and Free Exercise Clauses in a way that ensures that "there is room for play in the joints . . . [i]n other words, there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause." *Locke v. Davey*, 540 U.S. 712, 718-19 (2004) (internal citation omitted).

Likewise, the Equal Protection Clause cannot be reasonably construed to place government entities in an impossible bind "between the competing hazards of liability to minorities if [action] *is not* taken to remedy apparent employment discrimination and liability to nonminorities if [action] *is* taken." *Wygant*, 476 U.S. at 291 (O'Connor, J., concurring) (emphasis in original). Instead, the "'narrow tailoring' requirement of strict scrutiny allows the States a limited degree of leeway." *Vera*, 517 U.S. at 977.

2. A public entity that abandons an employment practice in order to comply with Title VII has a "strong basis in evidence" for doing so when the results of that employment practice would support a prima facie case of disparate impact discrimination.

This Court has repeatedly indicated that a prima facie case establishes the "strong basis in evidence" needed to satisfy strict scrutiny. In *Vera*, 517 U.S. 952, for example, the Court held that a state may take race-conscious action to comply with the Voting

Rights Act so long as it has a "'strong basis in evidence' for finding that the *threshold* conditions of § 2 liability are present," *id.* at 978 (listing three so-called *Gingles* factors), even though proof of an actual violation of Section 2 requires more, *see Johnson v. De Grandy*, 512 U.S. 997, 1011-12 (1994) (noting that proof of *Gingles* factor is not enough to establish liability). Likewise, in the affirmative action context, the Court has suggested that a prima facie case of discrimination by a public entity would provide a "strong basis in evidence" to support race-based remedial action. *See Croson*, 488 U.S. at 500; *see also id.* at 509 (plurality opinion) (indicating that a public entity is entitled to take race-conscious remedial action on the basis of a "significant statistical disparity" that gives rise to "an inference of discriminatory exclusion"); *Wygant*, 476 U.S. at 292 ("[D]emonstrable evidence of a disparity . . . sufficient to support a prima facie Title VII pattern or practice claim by minority [employees] would lend a compelling basis for a competent authority . . . to conclude that [voluntary action] is appropriate.") (O'Connor, J., concurring).[7]

So too, in this context, a prima facie case of disparate impact—*i.e.*, evidence showing that the specific employment practice has a substantial

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[7] *See also Howard v. McLucas*, 871 F.2d 1000 (11th Cir. 1989) (prima facie case of disparate impact constitutes "strong basis in evidence"); *Davis v. City and County of San Francisco*, 890 F.2d 1438, 1442-44, 1446-47 (9th Cir. 1989) (same); *Bushey v. N.Y. State Civil Serv. Comm'n*, 733 F.2d 220, 228 (2d Cir. 1984) (same).

disparate impact on a protected class of workers, *see* 42 U.S.C. § 2000e-2(k)—provides an employer with a strong basis in evidence to conclude that action is required to further its interest in compliance with Title VII.

3. Requiring employers to go further, as petitioners suggest (Petr. Br. 33), and determine whether the foregone test is consistent with business necessity, or susceptible of equally effective alternatives, is unwarranted for at least three reasons.

First, a stronger showing is not required to protect the rights of non-minority employees. Demonstrating a prima facie case is not an insignificant requirement. It is not enough, for example, "to show that there are statistical disparities in the employer's work force." *Watson*, 487 U.S. at 994. Instead, the employer must also "isolat[e] and identify[] the specific employment practices that are allegedly responsible for any observed statistical disparities," using "statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group." *Id.* at 994-95.

In addition, Congress has pervasively regulated what steps an employer may take to voluntarily comply with the Act's disparate impact provisions, thereby guarding against the risk that employers will go too far in seeking to comply with federal law and unduly infringe upon the rights of innocent third parties. For example, Title VII prohibits employers from using compliance with the Act's disparate treatment provision as a pretext for intentionally

discriminating against individuals on the basis of race. *See* U.S. Br. 15-18. Moreover, the Act prohibits employers from remedying disparate impact by adjusting test scores, using different cutoff scores, or otherwise altering the results of employment tests on the basis of race. 42 U.S.C. § 2000e-2(l). As a result, employers are generally confined to responding to the risk of disparate impact by replacing a suspect employment test or practice with another, less discriminatory one. As discussed next, such action does not risk the same kind of serious harm occasioned by racial quotas or other kinds of racial classifications that impose significant burdens on particular individuals because of their race. *See infra* at 22-24, 32-34. This lesser degree of potential harm undermines any claim that the demands of strict scrutiny require a higher showing by employers before they may undertake voluntary action to comply with Title VII.

Second, requiring employers to conduct validation studies of every employment practice they chose to forgo would be costly for employers and, ultimately, taxpayers. The costs are magnified by the frequency with which employers must make decisions that are subject to Title VII's disparate impact standard. States engage in redistricting once a decade; state employers choose and administer tests, develop hiring criteria, and modify the rules of promotion and benefit systems all the time. The constitutional standard must take into account states' interest in effective and efficient management of their workforces.

Third, petitioners' stricter standard would inevitably produce greater uncertainty and,

therefore, more litigation. Whether a test produces a disparate impact sufficient to state a prima facie case is relatively easy to determine and provides a bright-line rule against which employers can act with a high degree of confidence that their actions are constitutional and not subject to reasonable dispute. A test that asks, in addition, whether the foregone test was consistent with business necessity, and whether the alternative chosen is "equally effective," draws a less certain line.

Finally, such uncertainty would "severely undermine public employers' incentive to meet voluntarily their civil rights obligations." *Wygant*, 476 U.S. at 290 (O'Connor, J., concurring). This Court has recognized the value of encouraging employers "to self-examine and self-evaluate their employment practices" in order to bring themselves into compliance with federal law. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-18 (1975) (citation omitted); *see also Local No. 93, Int'l. Ass'n of Firefighters, AFL-CIO, C.F.C. v. City of Cleveland*, 478 U.S. 501, 515 (1986); *EEOC v. Shell Oil Co.*, 466 U.S. 54, 77 (1984). Such voluntary compliance is not only the most expedient means to achieving Title VII's ends, but it also obviates the need for employees to undertake the difficulty and expense of litigation to vindicate their civil rights. Moreover, voluntary compliance has intrinsic importance of its own, "both because of the example its voluntary assumption of responsibility sets and because the remediation of governmental discrimination is of unique importance." *Wygant*, 476 U.S. at 290 (O'Connor, J., concurring). All of these values are undermined by a standard that increases the costs, and risks,

associated with seeking to comply with Title VII's disparate impact requirement without resort to litigation.

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For the reasons set forth in respondents' brief, New Haven had ample evidence to conclude that its prior employment test had a sufficiently disparate impact on African-American employees to establish a prima facie case under Title VII. *See* Resp. Br. 54-55. Accordingly, refusing to certify the results of the test was a narrowly tailored means of furthering respondents' compelling interest in complying with Title VII.

IV. Petitioners' Suggestion That Title VII Is Itself Unconstitutional Is Meritless.

For the reasons just stated, the Court can and should resolve petitioners' constitutional claims without addressing the constitutionality of Title VII's disparate impact provision or petitioners' underlying constitutional arguments that could draw the Act's constitutionality into question. If, however, the Court undertakes to decide the proper level of constitutional scrutiny for government efforts to avoid disparate impact, it should reject petitioners' claim that strict scrutiny applies and its implicit suggestion that Title VII is itself unconstitutional.

Avoiding disparate impact is not tantamount to intentional racial discrimination against the group that disproportionately benefits from the abandoned practice. Forsaking a suspect employment test does not classify individual employees for disparate treatment on the basis of their race. Nor is it a facially neutral practice undertaken for a racially

discriminatory purpose. Moreover, even if the Court considered avoiding disparate impact to be race conscious to some degree, it is not the kind of race-based conduct that warrants strict scrutiny.

A. Avoiding Disparate Impact Is Not A Form Of Racial Classification.

Strict scrutiny is generally reserved for government acts that explicitly classify individuals on the basis of their race and subject them to differential treatment on the basis of that classification. *See, e.g., Brown v. Board of Education*, 347 U.S. 483 (1954) (school segregation on the basis of race); *Gayle v. Browder*, 352 U.S. 903 (1956) (per curiam) (segregated seating on public buses); *Loving v. Virginia*, 388 U.S. 1 (1967) (miscegenation law). The Court has frequently referred to such practices as employing a "racial classification." *See, e.g., Parents Involved in Community Schools v. Seattle School District No. 1*, 127 S. Ct. 2738, 2751-52 (2007); *Johnson v. California*, 543 U.S. 499, 505-06 (2005); *Shaw v. Reno*, 509 U.S. 630, 642-43 (1993).

Racial classification—that is, "[r]eduction of an individual to an assigned racial identity for differential treatment"—is "among the most pernicious actions our government can undertake," *Parents Involved*, 127 S. Ct. at 2796 (Kennedy, J., concurring), because both the racial designation and the differential treatment on the basis of the designation cause distinct and serious harms. "To be forced to live under a state-mandated racial label is inconsistent with the dignity of individuals in our society." *Id.* at 2797 (Kennedy, J., concurring) (Kennedy, J., concurring). Accordingly, the act of

racial designation alone can risk stigmatic injury, causing harm to the individual and society at large. *See, e.g., id.*; *Miller v. Johnson*, 515 U.S. 900, 911-12 (1995). In addition, state action on the basis of that designation generally inflicts significant and unfair practical harm as well. *See, e.g., Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 283-84 (1986) (plurality opinion) (loss of job); *Bazemore v. Friday*, 478 U.S. 385, 388 & n.1 (1986) (per curiam) (diminished pay). And the unfair distribution of government burdens and benefits can lead to divisiveness, resentment, and racial polarization. *See, e.g., Parents Involved*, 127 S. Ct. at 2796 (Kennedy, J., concurring).

A decision not to implement a test with a suspected disparate impact is a facially neutral act that does not classify workers for disparate treatment on the basis of race. First, choosing one test over another is facially neutral. While the employer may look at aggregate racial statistics to determine whether the test has a disparate impact,[8] it does not label individuals for race-specific treatment, as occurs when the state engages in a traditional racial classification. Second, and as a result, the employer does not treat individuals differently on the basis of their race. To the contrary, whatever test is eventually chosen will be provided to all employees,

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[8] The collection of racial data for aggregate analysis does not constitute a racial classification within the meaning of this Court's cases. Merely gathering information does not risk the kind of stigmatizing injury, racial polarization, or subsequent race-based treatment that warrants the special skepticism of strict scrutiny. *See generally* Andrew M. Carlon, *Racial Adjudication*, 2007 B.Y.U. L. REV. 1151.

and each will be treated equally in accordance with the results. Moreover, it is impossible to say in advance whether any given individual will do better or worse under any particular test. Some in the previously benefited group will be disadvantaged by the change, while others in the group will benefit even more from it. In short, the change in procedure does not single out for differential treatment any individual because of his race.

B. The Desire To Avoid An Unjustified Disparate Impact Is Not A Racially Discriminatory Purpose.

That respondents' conduct was facially neutral does not end the inquiry, of course. As discussed in the next section, *see infra* at 27-37, strict scrutiny is sometimes applied to government action that, "though race neutral on [its] face," is "motivated by a racial purpose or object." *Miller*, 515 U.S. at 913; *see also Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 265-66 (1977).[9] But this principle has no application here because acting to comply with Title VII, and to avoid an unnecessary disparate impact, is not an act "motivated by a racial purpose or object." *Id.*

Strict scrutiny applies to government action that is neutral on its face, but intended to achieve a particular racial result. *See, e.g., City of Richmond v.*

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[9] Thus, discrimination on the basis of language or immigration status, for example, is subject to strict scrutiny if shown to be used as a proxy for race or national origin. *See, e.g., Yu Cong Eng v. Trinidad*, 271 U.S. 500 (1926).

J.A. Croson Co., 488 U.S. 469, 477-78 (1989) (city ordinance requiring thirty-percent minority contractor set-aside); *Hunter v. Underwood*, 471 U.S. 222 (1985) (statute intended to maximize disenfranchisement of African Americans). Title VII's disparate impact provision is different: while it requires an employer to be aware of the racial outcome of its practices, the provision's purpose is not to achieve any particular racial result, but rather to ensure a fair and accurate process for distributing employment opportunities, consistent with the legitimate interests of business owners.

An employer that seeks to ensure that its processes are neutral in both intent and effect does not act with the kind of racial purpose that invokes strict scrutiny. *See Personnel Admin. of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) (intentional discrimination requires that "the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group").[10] Title

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[10] Consider, for example, an employer that orders its supervisors to assign overtime-assignment opportunities at random, but discovers that African-American employees are being given overtime opportunities in substantial disproportion to their numbers. The employer would have reason to believe that the random selection process was not working properly, and could reasonably decide to replace it with a system of rotating assignments. In so doing, the employer would be aware that the predictable effect would be the reduction of overtime pay for African-American employees on average. But that would not mean that it took that action "because of" any worker's race. *See Feeney*, 442 U.S. at 279. Moreover, this would be true even if the employer could have, but chose not to,

VII's disparate impact provision is directed at ensuring the fairness and legitimacy of employment tests, not at achieving any particular racial outcome. Congress sought merely to "achiev[e] equality of employment *opportunities* and remov[e] barriers to such equality"; it did not intend to require any "overall number of minority or female applicants actually hired or promoted." *Connecticut v. Teal*, 457 U.S. 440, 449-50 (1982) (internal quotation marks and citations omitted) (emphasis added). To that end, Title VII does not require employers to use practices that achieve any specific racial result—so long as the practice is job-related, and does not have an unnecessary disparate impact, it may be used even if it results in the complete exclusion of minority employees. At the same time, an employer is under no compulsion to choose a test that *maximizes* minority success—all Title VII requires is that the test not unnecessarily disadvantage minority workers.

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conduct a statistical analysis to determine whether the disparate results it observed were consistent with the normal variations in a random process. So long as the employer acts out of a concern about the validity of its assignment process, and not to achieve any particular racial result, it does not act with the kind of racial purpose that invokes strict scrutiny.

C. To The Extent That Avoiding Disparate Impact Is Seen As Race Conscious, Strict Scrutiny Nonetheless Does Not Apply.

Even if avoiding disparate impact were seen as race conscious to a degree, this minimal consideration of race does not warrant strict scrutiny.

1. Almost all facially neutral government action has the potential to affect racial or other groups differently. The decision to increase government funding for treatment of one disease, rather than another, can have disparate effects on the basis of race or sex. *See* U.S. CENTERS FOR DISEASE CONTROL AND PREVENTION, FACT SHEET: RACIAL/ETHNIC HEALTH DISPARITIES (2004), *available at* http://www.cdc.gov/od/oc/media/pressrel/fs040402.htm. Where to build a school, or whether to close a particular community hospital, will often affect one racial or ethnic group disproportionately in light of residential segregation in our neighborhoods. *See, e.g.*, *Bryan v. Koch*, 627 F.2d 612 (2d Cir. 1980) (discussing a hospital closing in Harlem). For the same reason, the location of undesirable facilities (such as landfills and power stations) or the allocation of resources to remediate environmental hazards will frequently have a racially disparate effect. And, as illustrated by this case, the choice of an employment test or practice can often have a disparate impact on the ability of women and minorities to obtain or advance in employment.

This Court has recognized that public entities are not required by the Constitution to take such considerations into account: the mere awareness of

the disparate impact of a decision does not subject it to strict scrutiny. *See Washington v. Davis*, 426 U.S. 229, 239 (1976). But at the same time, this Court should make clear that the Constitution does not strictly limit or prohibit consideration of such consequences either. The potential disparate distribution of the benefits and burdens of government action is naturally one of the considerations public officials take into account in making policy decisions, with the legitimate goal of ensuring that those burdens and benefits are not concentrated along racial or other lines. Yet, the logic of petitioner's Equal Protection claim in this case would draw into serious question the constitutionality of public officials' attempts to avoid or minimize policies that exacerbate the long-standing inequality that continues to divide the nation.

Thus, for example, petitioners' position would subject to strict scrutiny a public housing department's consideration of the effect on racial segregation of the location for a new development, and would call into question the United States Sentencing Commission's recent decision to amend the federal sentencing guidelines to reduce the crack-to-powder cocaine ratio in part because of its finding that "[t]he current severity of crack cocaine penalties mostly impacts minorities." U.S. SENTENCING COMMISSION, REPORT TO THE CONGRESS, COCAINE AND FEDERAL SENTENCING POLICY 8 (May 2007). And it would subject to strict scrutiny public efforts to

minimize racial disparities in access to health care,[11] the incidence of serious diseases,[12] or infant mortality,[13] which necessarily entail race-conscious decisionmaking and adjustment of resources in a way that may disadvantage some who benefit under the current system.

2. This Court has previously recognized that such facially neutral, race-conscious efforts do not warrant strict scrutiny.

In the election law context, this Court has held that "[s]trict scrutiny does not apply merely because redistricting is performed with consciousness of race.

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[11] *See, e.g.*, U.S. DEP'T OF HEALTH AND HUMAN SERVS., HEALTH RES. AND SERVS. ADMIN., ADDRESSING RACIAL AND ETHNIC DISPARITIES IN THE CONTEXT OF MEDICAID MANAGED CARE: A SIX-STATE DEMONSTRATION PROJECT (2004), *available at* ftp://ftp.hrsa.gov//financeMC/HRSA-Disparities-in-MC-Report.pdf (describing race-conscious efforts to reduce racial disparities in access to health care).

[12] *See, e.g.*, U.S. Ctrs. for Disease Control & Prevention, *Racial Disparities in Nationally Notifiable Disease—United States, 2002*, MORBIDITY AND MORTALITY WEEKLY REPORT, Jan. 14, 2005, *available at* http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5401a4.htm (documenting substantial racial disparities in incidence of serious infectious diseases and urging directed action to reduce the disparities).

[13] *See, e.g.*, U.S. CTRS. FOR DISEASE CONTROL & PREVENTION, OFFICE OF MINORITY HEALTH & HEALTH DISPARITIES, ELIMINATING RACIAL & ETHNIC HEALTH DISPARITIES, available at http://www.cdc.gov/omhd/About/disparities.htm (identifying reduction of the racial disparity in infant mortality as one of six areas targeted by the agency for special action, and noting that "[i]n 2000, the black-to-white ratio in infant mortality was 2.5" and "widening").

Nor does it apply to all cases of intentional creation of majority-minority districts. Electoral district lines are 'facially race neutral,' so a more searching inquiry is necessary before strict scrutiny can be found applicable in redistricting cases than in cases of 'classifications based explicitly on race.'" *Bush v. Vera*, 517 U.S. 952, 958 (1996) (plurality opinion) (citations omitted) (quoting *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 213 (1995)); *see also Shaw v. Hunt*, 517 U.S. 899, 905 (1996).

Members of this Court have reached the same conclusion with respect to race-neutral attempts to promote integration and racial diversity in public education. Justice Kennedy has explained that "strategic site selection of new schools . . . [or] tracking enrollments, performance, and other statistics by race," undertaken with "the goal of bringing together students of diverse backgrounds and races," are all "mechanisms [that] are race conscious but do not lead to different treatment based on a classification that tells each student he or she is to be defined by race, so it is unlikely any of them would demand strict scrutiny to be found permissible." *Parents Involved*, 127 S. Ct. at 2792 (Kennedy, J., concurring); *see also* Danielle Holley & Delia Spencer, *The Texas Ten Percent Plan*, 34 HARV. C.R.-C.L. L. REV. 245, 252-59 (1999) (discussing Texas's "Ten Percent Plan," a facially neutral policy enacted by a legislature conscious that the plan would be likely to improve racial diversity at state universities). And Justice Thomas has recognized that "the adoption of [a particular] admissions method" to "achieve [a] vision of [a] racially aesthetic student body" may be permissible, despite its clear

racial purpose, so long as it avoids "the use of racial discrimination." *Grutter v. Bollinger*, 539 U.S. 306, 361-62 (2003) (Thomas, J., concurring in part and dissenting in part).

Finally, a majority of the Court has concluded that strict scrutiny likewise should not apply to race-neutral measures taken to improve minority participation in government contracting, an area closely akin to the public employment at issue in this case. In *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 519 (1989), Justice O'Connor—writing for herself, the Chief Justice, Justice White, and Justice Kennedy—explained that even when a public entity lacks the justification that would warrant taking race-based action that would invoke strict scrutiny, it nonetheless may take action for the specific purpose of "increas[ing] the opportunities available to minority business without classifying individuals on the basis of race." *Id.* at 509-10 (plurality opinion).

One such permissible measure, the plurality explained, was taking steps to eliminate "barriers" that "may be the product of bureaucratic inertia more than actual necessity, and may have a disproportionate effect on the opportunities open to new minority firms." *Croson*, 488 U.S. at 510 (plurality opinion). This includes not only removing government-imposed barriers but also enacting legal rules to prohibit private discrimination. *Id.* (plurality opinion). And this prohibition, the plurality continued, may extend not simply to private *intentional* discrimination, *see id.* (noting that the city may also enact to prohibit discrimination in the provision of credit or bonding by local suppliers and banks") (plurality opinion), but also to business

practices that have an unwarranted disparate impact: "Business as usual," the plurality explained, "should not mean business pursuant to the unthinking exclusion of certain members of our society from its rewards." *Id.* (plurality opinion).

Although disagreeing on other aspects of the case, four other Justices also took the view that strict scrutiny would not apply to race-neutral efforts to increase minority contracting.[14]

3. Title VII's proscription against employment practices that have an unjustified disparate impact is precisely the kind of race-neutral action to remove unnecessary barriers to minority advancement that a majority of the Court endorsed in *Croson*. Moreover, declining to subject such action to strict scrutiny is consistent with the basic purposes and principles of the Equal Protection Clause.

First, facially neutral action, taken with some consciousness of race, does not pose the same risk of individual injury as overt racial classifications. At most, it involves consideration of race "in a general way and without treating" any individual "in a different fashion solely on the basis of a systematic,

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[14] The three dissenting Justices concluded that strict scrutiny should not apply even to express racial classifications, so long as they were undertaken for a remedial purpose. *Croson*, 488 U.S. at 551-53 (Marshall, J., dissenting). While Justice Scalia disagreed with that position, he nonetheless stated that a public entity "can, of course, act 'to undo the effects of past discrimination' in many permissible ways that do not involve classification by race." *Id.* at 526 (Scalia, J., concurring in the judgment).

individual typing by race." *Parents Involved*, 127 S. Ct. at 2792 (Kennedy, J., concurring). Such aggregate-level racial considerations thus do not present the risk of stigmatizing posed by individual-level actions that "reduce [people] to racial chits." *Id.* at 2797 (Kennedy, J., concurring); *see also Vera*, 517 U.S. at 1008 (Stevens, J., dissenting) (noting distinction between racial classifications that "harm[] an individual or set of individuals because of their race" and the "more diffuse" harm caused when districting "lines are drawn based on race"). The attenuated risk of race-based harm to individual citizens is constitutionally significant, for the Equal Protection Clause "protect[s] *persons*, not *groups*." *Adarand*, 515 U.S. at 227 (emphasis in original).

Second, avoiding a disparate impact reduces the chance that individual citizens will be deprived of government benefits, or subjected to burdens, on the basis of their race. As noted above, preferring one employment test over another does not determine the success of any particular individual on the basis of his race. So long as the test is job-related, individuals of all races should have a fair chance at advancement, and none should feel that they have been disadvantaged because of their race, particularly when an employer could have chosen the less discriminatory test initially (if by nothing more than sheer happenstance). This is markedly different from racial classifications that have an open, direct, and concrete effect on individuals' opportunities because of their race. To the extent that there is a cost to be borne by governmental efforts to avoid unnecessary barriers to minority advancement, the cost is spread more diffusely and falls less heavily on

any given individual. *Cf. Wygant*, 476 U.S. at 280-83 (plurality opinion) (noting constitutional preference for race-based action that minimizes individualized burdens on innocent third parties).

Finally, unlike racial classifications, a decision to avoid an unnecessary disparate impact is significantly less likely to be founded in invidious animus. *Cf. Johnson v. California*, 543 U.S. at 505 (noting that strict scrutiny is applied to racial classifications because "[r]acial classifications raise special fears that they are motivated by an invidious purpose").

4. *Amici* do not suggest that strict scrutiny should *never* apply to a neutral action undertaken for a race-conscious purpose.

When the racial purpose motivating a facially neutral action is invidious, the policy is subject to strict scrutiny and should be held unconstitutional. *See, e.g., Gomillion v. Lightfoot*, 364 U.S. 339, 341 (1960) (finding a redistricting measure unconstitutional on facts leading to the "irresistible" conclusion "that the legislation is solely concerned with segregating white and colored voters by fencing Negro citizens out of town so as to deprive them of their pre-existing municipal vote"); *Rogers v. Lodge*, 458 U.S. 613, 622 (1982) (overturning an election system "maintained for the invidious purpose of diluting the voting strength of the black population"); *Hunter*, 471 U.S. at 232 (holding unconstitutional a felon disenfranchisement law whose "purpose to discriminate against all blacks . . . was a 'but-for' motivation").

Moreover, strict scrutiny is also appropriate when a decision is unduly influenced by race. In the voting context, for example, the Court has recognized that while race-conscious districting is not automatically subject to strict scrutiny, a "constitutional wrong occurs when race becomes the 'dominant and controlling' consideration." *Shaw v. Hunt*, 517 U.S. 899, 905 (1996). In other words, strict scrutiny applies when "legitimate" considerations are "subordinated to race." *Vera*, 517 U.S. at 959 (plurality opinion) (internal quotation marks omitted) (citing *Miller*, 515 U.S. 900, 916 (1995)). In such cases, the basic risks justifying strict scrutiny—including the risk of invidious action, stigmatization, and racial polarization—are sufficiently heightened that strict scrutiny should apply.

Here, Title VII's disparate impact provision obviously does not compel public employers to act with animus. Indeed, any action taken for the purpose of disadvantaging specific individuals because of their race would violate the statute itself. *See* U.S. Br. 15-18. Nor does Title VII require employers to make race the predominant consideration in any hiring, promotion, or other employment decision. To the contrary, Title VII expressly subordinates race to other legitimate considerations by, for example, allowing employers to maintain practices with even marked disparate impacts when consistent with business necessity. 42 U.S.C. § 2000e-2(k). Moreover, Title VII expressly disavows any requirement of racial balance, *id.* § 2000e-2(j), and forbids employers to adjust test scores on the basis of race, *id.* § 2000e-2(l).

Of course, an individual employer might actually be motivated by animus or unreasonably elevate race above other considerations. In that circumstance, the disadvantaged employee would have a potentially viable Equal Protection claim against the employer, to the extent the action was not in fact required to comply with Title VII.[15] However, in that circumstance, the constitutional claim would be unnecessary as Title VII itself would make the action illegal. *See* U.S. Br. 15-18.

5. Finally, applying strict scrutiny to all forms of neutral, but race-conscious, conduct could hamstring Congress in the exercise of its constitutional responsibility to enforce the guarantees of the Fourteenth Amendment through "appropriate legislation." U.S. CONST. amend. XIV, § 5. This Court has recognized that this express delegation of authority necessarily affords Congress considerable leeway to determine what steps are necessary to "deter[] or remed[y] constitutional violations." *City of Boerne v. Flores*, 521 U.S. 507, 518 (1997). And it has previously endorsed legislation proscribing disparate impact as generally appropriate to enforce the requirements of the Equal Protection Clause. *Tennessee v. Lane*, 541 U.S. 509, 520 (2004). To now hold that such legislation must itself survive strict

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[15] If the action was required by Title VII—because, for example, the current practice had an unlawful disparate impact—then the employer's discriminatory intent would not be the legal cause for the challenged conduct and compliance with Title VII would not be rendered unconstitutional by the employer's subjective state of mind. *See Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 285-87 (1977).

scrutiny would strip Congress of the broad discretion Section 5 intended to afford it and deprive the nation of a necessary and effective means of ensuring equality of economic and social opportunity in America.

* * * *

Petitioners' constitutional claims depend on their assertion that attempting to avoid a disparate impact triggers strict scrutiny under the Equal Protection Clause; they do not claim that such action would fail any lesser degree of constitutional scrutiny. Because petitioners' premise is incorrect, the Court should reject any suggestion that Title VII's disparate impact provision transgresses constitutional boundaries by requiring conduct that is prohibited by the Fourteenth Amendment.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

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March 25, 2009

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Supreme Court, U.S.
FILED
FEB 26 2009
OFFICE OF THE CLERK

(17) (17)

Nos. 07-1428, 08-328

IN THE

Supreme Court of the United States

FRANK RICCI, ET AL.,
Petitioners,
v.
JOHN DESTEFANO, KAREN DUBOIS-WALTON, THOMAS UDE, JR., TINA BURGETT, BOISE KIMBER, MALCOLM WEBER, ZELMA TIRADO, AND CITY OF NEW HAVEN,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit

AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL RIGHTS UNION IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS CURAIE*[1]

The American Civil Rights Union (ACRU) is a nonpartisan legal policy organization dedicated to defending all constitutional rights, not just those that might be politically correct or fit a particular ideology. It was founded in 1998 by long time Reagan policy advisor and architect of modern welfare reform Robert B. Carleson, and since then has filed *amicus curiae* briefs on constitutional law issues in cases all over the country.

Those setting the organization's policy as members of the Policy Board are former U.S. Attorney General Edwin Meese III; former Federal Appeals Court Judge and Solicitor General Robert H. Bork; Pepperdine Law School Dean Kenneth W. Starr; former Assistant Attorney General for Civil Rights William Bradford Reynolds; John M. Olin Distinguished Professor of Economics at George Mason University Walter Williams; former Harvard University Professor, Dr. James Q. Wilson; Ambassador Curtin Winsor, Jr.; and Dean Emeritus of the UCLA Anderson School of Management J. Clayburn LaForce.

This case is of interest to the ACRU because we want to ensure that all constitutional rights are fully protected, not just those that may advance a

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[1] Peter J. Ferrara and Carlos S. Ramirez authored this brief for the American Civil Rights Union (ACRU). No counsel for either party authored the brief in whole or in part and no one apart from the ACRU made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief, and were timely notified.

particular ideology. This includes the guarantee of Equal Protection against racial discrimination provided by the Fourteenth Amendment.

INTRODUCTION

The United States Constitution provides the groundwork for a society in which race is an irrelevant factor in determining the qualifications of an individual. We are blessed to live in a society in which the value of a person is determined by their character, intellect, achievements and constitution. The Equal Protection Clause sets forth the inviolable principles of race neutrality and equal treatment. These principles, the Court has ruled, are not advanced by discriminating against one to benefit another. The only way to stop invidious, government-endorsed discrimination is to strictly scrutinize governmental practices that use racial distinctions, considerations and motivations, and permit them only in the narrowest of terms to correct intentional discrimination by government.

The New Haven Charter and Connecticut state law require a fair and equitable civil service system, grounded on merit-based promotion consideration for its employees. However, that principle was tucked away in a drawer, when under the guise of remedying discrimination, the Respondents changed the rules mid-game to the detriment of Petitioners. Petitioners took a promotion exam, believing that the results on the exam were binding, and that those who scored at the top would be promoted. Respondents went back on their word and broke their own policy, when for race-

based reasons they refused to certify the promotion tests Petitioners took. Respondents are doing nothing more than telling veterans of the civil service that they are not deserving of promotion for no reason other than their race.

STATEMENT OF THE CASE

When command-level vacancies came up in the New Haven fire department, the city sought to fill those vacancies using a merit-based, race-neutral civil service exam as required by local law. Petitioners took this exam and were deemed eligible for promotion based on their superior scores, but were denied promotions by the city because the results of the examination were racially disparate. New Haven then announced its intention to leave the vacancies open, and intended to repeat the competition for promotion, using a system that aimed to promote a higher number of minority candidates.

New Haven's Charter requires a competitive, merit-based promotions system, requiring that all positions in the civil service be filled by the most knowledgeable and able individuals, as determined by job-related examinations. These examinations may not take race into account when determining eligibility. Pet.App. 74a-77a, 80a-82a. After each examination, the civil service board must certify a ranked list of eligible candidates to fill the vacancies. This list consists of candidates who scored at least seventy percent on the examination. The Board of Fire Commissioners has implemented a "Rule of Three," requiring that the board fill existing

vacancies from the top three scorers on the list, as a method of preventing political patronage, discouraging favoritism, and ensuring the selection of the most qualified candidates. Pet.App. 88a-90a, 104a-106a.

Respondents made significant efforts to ensure that the 2003 promotion exams were job-related and race-neutral, even hiring an out of state firm to develop the promotional examination in a manner that tested the knowledge, skill and abilities of the candidates for promotion fairly and accurately. The exam included all the subjects that a multi-disciplinary agency like the New Haven Fire Department would require its lieutenants and captains to be familiar with, and focused on testing those factors. Pet.App. 160a-161a, 267a-268a, 338a.

The record below shows that the developers of the exam went to great lengths to ensure that the exam was job-related and race-neutral, including making multiple changes to their draft test in order to accommodate concerns, ensuring that all items tested were available on source material, and wrote the exams below the tenth grade reading level to mitigate any disparate impact.

Adding to Respondents efforts to mitigate any impact of race, New Haven also provided for an oral portion to the examination before an examination panel, complete with rigid, consensus based scoring guidelines, and providing candidates with the opportunity to organize their thoughts in writing before answering verbally. Pet.App. 164a-168a.

New haven race-coded the candidates, and the scoring results revealed racial disparities comparable to previous years. Candidates of all races passed both exams and were eligible for promotion. However, due to the number of vacancies and the rule of three, no minorities would be promoted to lieutenant and two Hispanics would be promoted to captain. Later, three vacancies arose that would promote three African-Americans to lieutenant. Pet.App. 235a-236a, 305a-306a.

Respondents then attempted to impugn the validity of the examinations. They first claimed flaws in the test, which the testing agents denied. Respondents refused to accept a report from the testing agents elaborating on the testing method's scoring methodology and content. Pet-App. 190a-191a, 287a, 329a-339a.

The Respondents then engaged in other efforts to decertify the exam. The Civil Service Board met, and heard testimony of adverse impact from the written exams. One of the opinions rendered to the board, by a competitor of New Haven's chosen testing agency, claimed that he could develop a test with less disparate impact, albeit without ever having seen the exam actually administered. Pet.App. 548a-549a.

The board finally abandoned the list on the urging of the mayor and other witnesses. The Chief and Assistant Chief of the fire department were not allowed to speak before the board. Pet.App. 228a-229a, 458a-459a, 575a-582a, 817a-818a, 845a-852a. The board deadlocked and the promotions were disapproved. The mayor had been prepared to

override a board vote with an executive order to prohibit the fire department from promoting anyone. Pet.App. 590a-591a, 819a-820a.

Petitioners then filed this action in U.S. District Court under 42 U.S.C. §1983 alleging a violation of the Equal Protection Clause, accompanied by right-to-sue letters from the EEOC. The district court granted summary judgment against Petitioners, a judgment the court of appeals affirmed in a one-sentence order.

This Court granted certiorari.

SUMMARY OF ARGUMENT

Respondents' cancellation of Petitioners' promotion was based solely on their race and is a violation of the Equal Protection Clause. The Equal Protection Clause subjects racially motivated government action to strict scrutiny analysis, and requires a compelling government interest advanced by narrowly tailored means to sustain a racially motivated government action.

Respondents have not articulated any compelling interest to advance, and claim only that promoting Petitioners would make them liable for disparate impact claims under Title VII. The Equal Protection Clause does not and cannot permit government to intentionally discriminate on the basis of race to avoid unintentional discrimination on the basis of race. Even if this interest were to be found to be compelling, Respondents' action was not narrowly tailored. Respondent cancelled the

promotions after disparate impact was evident, and did so bending to political pressure. Respondents took exhaustive measures to mitigate disparate impact prior to administering the promotion exam and had the opportunity to take further measures, but refused. The cancellation of the promotions at such a late stage was not and cannot be considered a narrowly tailored means to achieving a compelling state interest.

Allowing Respondents' actions to pass or evade strict scrutiny would result in governments being forced to intentionally discriminate in order to avoid unintentional discrimination, creating a result that goes against the spirit and letter of the Fourteenth Amendment to the Constitution and would inevitably create a divisive, rancorous environment in government agencies that refuse to promote qualified applicants because of their race.

ARGUMENT

I. RESPONDENTS' RACE-BASED REFUSAL TO PROMOTE PETITIONERS IS SUBJECT TO STRICT SCRUTINY ANALYSIS UNDER THE EQUAL PROTECTION CLAUSE.

The Equal Protection Clause disfavors racially motivated government action, requires that such action be strictly scrutinized, and results in it being invalidated in all but the rarest of circumstances. See, *e.g.*, *Hunter v. Erickson,* 393 U.S. 385 (1969) (Because the core of the Fourteenth Amendment is the prevention of meaningful and unjustified official

distinctions based on race, racial classifications are "constitutionally suspect," and subject to the "most rigid scrutiny." They bear a far heavier burden of justification than other classifications.). The Courts view racially motivated government action with hostility and skepticism, as equal treatment of race is the absolute core of the guarantee of the Equal Protection Clause. See *Washington* v. *Davis*, 426 U.S. 229, 239 (1976) ("The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race.").

In order to memorialize the Constitution's command to avoid racially motivated distinctions, the Court has made clear that all race-based government actions are subject to the strictest of scrutiny, requiring a showing by government that the race-based action is narrowly tailored to achieve a compelling government interest. See *Adarand v. Pena*, 515 U.S. 200, at 227 (1995)(plurality opinion). The Court has found few governmental interests compelling enough to justify race-based treatment, and fewer actions narrowly tailored to achieve such an interest. Even when race-based actions are taken in order to benefit minorities with no animus to whites, the policies are not insulated from strict scrutiny analysis. See *Adarand, Id.* at 226.

Petitioners were denied promotion due to thei race. Respondents articulated no other grounds and availed themselves of no other claims that their decision to refuse to certify the promotions list was based on any factor other than race. Respondents' attempt to characterize their actions as an attempt

to comply with Title VII does not shield their action from scrutiny. New Haven officials acted on racial identification of the promotion candidates as the primary motivation for their actions. Respondents' action to block Petitioner's promotions was motivated exclusively by race.

The Court in *Adarand* stated that "whenever the government treats any person unequally because of [his] race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of Equal Protection." *Adarand,* 515 U.S., at 229-230. Petitioners were not promoted due to their race. Respondents do not deny that had more minority candidates been eligible for promotion, they would not have challenged the results of the promotion exam. Respondents did not articulate a race-neutral reason for denying the promotions.

The fact that no one was promoted is irrelevant here. Petitioners suffered harm because they would have been promoted and were not. They were not promoted because the civil service board had a race-based goal in mind, and took a clear government action in order to advance that goal in a manner that resulted in harm to Petitioners.

II. RESPONDENTS' RACE-BASED DECISION TO DISREGARD THE EXAM RESULTS AND NOT PROMOTE PETITIONERS FAILS STRICT SCRUTINY.

A. Respondents have not articulated any compelling interest that would justify their racially motivated denial of Petitioners' earned promotions.

Respondents did not allege that they sought to achieve diversity or reverse prior discrimination as a motivation for denying Petitioners' promotions. The only remotely articulable interests espoused by Respondents were the avoidance of a Title VII violation,[2] and fear of political reprisal[3].

Allowing a government to engage in intentional racial discrimination to avoid a lawsuit for unintentional racial discrimination would result in pervasive discrimination flying in the face of the Fourteenth Amendment's Equal Protection Guarantee. Here, as evidenced by Respondents' extensive attempts to secure a race-neutral, job-related, merit-based method of testing that was developed and evaluated by outside professionals for validity, there is clear evidence that there was no unintentional discrimination, and that Respondents' actions in cancelling the promotions were an after-the-fact, invidious, intentional use of race as a factor to determine promotional eligibility.

Avoiding a Title VII disparate impact claim cannot justify intentional, race-based disparate treatment. See *People Who Care* v. *Rockford Board of Educ., Sch. Dist. No. 205*, 111 F.3d 528, 535 (CA7 1997). Allowing the avoidance of a Title VII lawsuit to become a compelling state interest would necessarily force governments to hire by quota, and

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[2] Pett.App. 47a

[3] Pet.App. 812a-816a, 882a-883a.

inevitably result in intentional discrimination in order to avoid lawsuits. The Equal Protection Clause prohibits only intentional discrimination, not disparate impacts. See *Washington v. Davis,* 426 U.S. 229, at 242 (1976).

If the Constitution were to allow fears of disparate impact liability to constitute a compelling state interest, the stage would be set for organized racial lobbies to engage in political efforts with noxious and divisive results, promoting notions of racial inferiority and leading to racial hostility.

B. Respondents' action was not narrowly tailored.

Respondents' remedy of its fear of disparate impact consisted of cancelling all promotions after the test had been given, scored, and a ranked list of candidates had been prepared. This action does not remotely meet the Constitutional requirement of narrow tailoring. There was no showing that respondents relied on racial classifications in a manner that was tailored in any way to their articulated interests.

Assuming *arguendo* that a fear of Title VII disparate impact claims is a valid, compelling state interest, the cancellation of the promotions after the administration and scoring of the test and the ranking of the candidates is by no means a narrowly tailored method. Respondents went to great lengths to ensure that the examinations would mitigate any anticipated adverse impact. Respondent did not present any valid alternatives to the testing with less disparate impact, and were aware that prior

promotion tests had shown disparate impact.

The city had a clear opportunity prior to administering the tests to make further attempts to reduce disparate impact and did not do so. Taking further measures to reduce disparate impact after the exams had been announced, studied for, administered and scored is not a narrowly tailored way to achieve any sort of interest, other than politically motivated racism. By cancelling promotions, Respondents achieved no reduction in disparate impact and caused injury, frustration and pain to Petitioners who dedicated extensive time and money to prepare for the examination, only to be later rejected because of their race.

III. ALLOWING THE RESPONDENTS' ACTION TO PASS OR EVADE STRICT SCRUTINY WILL UNDERMINE PUBLIC POLICY AND ENCOURAGE RACE-BASED HIRING PRACTICES.

In order to achieve promotion to command ranks, Petitioners underwent a grueling, two-part examination that required months of study and preparation. For Petitioners, their efforts paid off. They took their promotion tests and scored high enough to rank for promotion. Respondents negated Petitioners efforts by not honoring the results of the exam.

Respondents' went to great lengths to ensure that the test fairly and accurately measured the knowledge skills and abilities required of command rank positions in the New Haven Fire Department, and Petitioners unquestionably met these standards.

The New Haven tests were a glowing example of a purely merit-based process for selecting candidates for promotion.

However, under the guise of racial equality, New Haven has allowed racial considerations and political correctness to become the primary deciding factor by which promotions are determined, reducing merit and individual achievement to a lesser lever of importance, and allowing for political considerations to take a greater role in the process. Respondents have thus deprived the residents of New Haven of its most qualified servants, as determined by valid, appropriate, merit-based and fair civil service exams. See *People Who Care v. Rockford Bd. of Educ., School Dist. No. 205* 111 F.3d 528, 535 (C.A.7 (Ill.),1997) (warning of "the almost certain consequence that the teachers it was hiring would on average not be as good as if it were on the basis purely of merit").

Disaster strikes randomly and without prejudice. At a time when the public safety requires that its first responders be well trained, well equipped and well supervise, the community will likely not care whether the captain of the fire company is black, white or latino. The family watching their house burn does not care about the race of the fire lieutenant in charge of the group trying to stop the calamity.

However, there is nothing more divisive, more detrimental to the morale of a fire department, than a company that feels that their captain or lieutenant was promoted to that spot simply because of his race. A color-blind society cannot exist where government

disregards the efforts of dedicated public servants to pass an advancement test in order to promote less qualified individuals merely because of race. When a house is on fire, when lives are on the line, when important decisions have to be made, it is not the time to herald the artificial diversity of the command ranks of the fire company, but it is the time to rest assured that the rescuers responding are led by the best. It is impossible to guarantee that the best are in charge, when the best, as determined by a job-specific, race-neutral, merit-based test, are refused advancement because of their race.

CONCLUSION

For the above stated reasons, the judgment of the Second Circuit should be reversed.

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(16) (15)

Supreme Court, U.S.
FILED
FEB 26 2009
OFFICE OF THE CLERK

Nos. 07-1428 & 08-328

IN THE

Supreme Court of the United States

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v.

JOHN DeSTEFANO, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF *AMICUS CURIAE* OF ANTI-DEFAMATION LEAGUE IN SUPPORT OF NEITHER PARTY

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STATEMENT OF INTEREST OF *AMICUS*

The Anti-Defamation League ("ADL"), as *amicus curiae*, submits this brief in support of neither party in these cases.[1]

ADL was organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races, to combat racial, ethnic, and religious discrimination in the United States, and to fight hate, bigotry, and anti-Semitism. It is today one of the world's leading civil and human rights organizations. ADL's nearly 100-year history is marked by a commitment to protecting the civil rights of all persons, whether they are members of a minority group or of a non-minority group, and to assuring that each person receives equal treatment under the law. ADL believes that each person in our country has a constitutional right to be treated as an individual, rather than as simply part of a racial, ethnic, religious, or gender-defined group. In this connection, ADL has often filed briefs *amicus curiae* in this Court in cases arising under the Equal Protection Clause of the Fourteenth Amendment to the Constitution or the Nation's civil rights laws.[2]

---

1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief and such consents have been lodged with the Court.

2. *See, e.g.*, ADL briefs *amicus curiae* filed in *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Brown v. Board of Educ.*, 347 U.S. 483 (1954); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); (Cont'd)

In this brief, we suggest a mode of analyzing the "compelling state interest" aspect of strict scrutiny not as a means of supporting either party, but rather to assist the Court in resolving an issue left unaddressed by the lower courts.

INTRODUCTION AND SUMMARY OF ARGUMENT

ADL consistently has sought to reconcile its core mission – "to secure justice and fair treatment to all citizens alike . . . [and] put an end forever to unjust and unfair discrimination against . . . any sect or body of citizens" – with the use of racial preferences in access to social opportunity such as employment and education. ANTI-DEFAMATION LEAGUE 1913 CHARTER (1913). While ADL has endorsed limited racial preferences in order to remedy specific discrimination, it has repeatedly opposed the non-remedial use of race-based criteria, except under highly limited circumstances in the educational context where the government can identify a compelling interest to justify them, and has narrowly tailored their use to meet those legitimate interests.

(Cont'd)

DeFunis v. Odegaard, 416 U.S. 312 (1974); *United Jewish Orgs. of Williamsburg, Inc. v. Carey*, 430 U.S. 144 (1977); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); *United Steelworkers v. Weber*, 443 U.S. 193 (1979); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Palmore v. Sidoti*, 466 U.S. 429 (1984); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Johnson v. De Grandy*, 512 U.S. 997 (1994); *Miller v. Johnson*, 515 U.S. 900 (1995); *Gratz v. Bollinger*, 539 U.S. 244 (2003) and *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Parents Involved in Community Schools v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (2007).

We believe that the eradication of discrimination from our society is best achieved through strict assurance of equal treatment to all. Thus, while strongly supportive of municipal employers' voluntary compliance with Title VII, ADL maintains that New Haven's non-remedial use of raced-based criteria – its refusal to certify the promotional test results merely because "too many" members of one race did well on the test and were among those immediately eligible for promotion – must be subjected to strict scrutiny. Diversity in all facets – race, gender, religion, thought, life experiences, socioeconomic status – remains a key ingredient in America's continuing evolution toward a fully integrated society that honors inclusiveness, and is free of racial and ethnic hatred and the discrimination that flows from them. Unfortunately, the means chosen by New Haven to promote within its fire department threatens to reverse, not advance, that process, and in the end may exacerbate hostilities between racial and ethnic groups and foster resentment – exactly contrary to what Title VII is meant to promote.

Dissenting from the Second Circuit's refusal to rehear this case *en banc*, Judge Cabranes posited a list of "indisputably complex and far from well-settled" questions that this case raises. Op at 1-2 (Cabranes, J., dissenting). Supp. App. 13a. Among them is the question of what showing a municipal employer must make to substantiate its claim that it undertook a race-based action in order to comply with Title VII.

ADL submits that the municipality's action in a case such as this must be subjected to strict scrutiny. We further submit that where the municipality claims a compelling interest in avoiding Title VII liability or litigation, the standard for what it should be required to show should be fashioned from this Court's Equal-Protection jurisprudence under the Voting Rights Act – specifically, *Shaw v. Hunt*, 517 U.S. 899 (1996) (*Shaw II*). Under that standard, a municipality cannot meet the compelling state interest test merely by arguing that it wishes to avoid the expense and inconvenience of litigation, regardless of its merit or lack thereof. Rather, the municipality must show a "strong basis in evidence" that it would have faced liability in likely Title VII litigation, absent the challenged action. *Id* at 908 & n.4. Such a requirement will minimize the risk of an illegitimate racial classification.

New Haven thus far has not been put to its proofs as to whether it has a compelling interest in scrapping the test results – that is, whether, under the facts of this case, there was a "strong basis in evidence" that it would have been subject to Title VII liability. The record as it now exists leaves unresolved questions that require resolution by the district court.

ARGUMENT

I. Where a municipal employer admits making a race-conscious decision, even for the stated purpose of Title VII compliance or avoiding liability, its action must be subjected to strict scrutiny.

"It is well-established that when the government distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny." *Parents Involved in Community Schools v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2751-52 (2007), citing *Johnson v. California*, 543 U.S. 499, 505-506 (2005), *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003), and *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 224 (1995). *All* government-imposed racial classifications are subject to the exacting review of strict scrutiny. *Johnson*, 543 U.S. at 505 (emphasis in original), citing *Adarand*, 515 U.S. at 227. "[D]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Adarand*, 515 U.S. at 214 (internal quotation marks omitted); *see also Parents Involved*, 127 S.Ct. at 2767 (Roberts, C.J., concurring).

New Haven's conduct in rejecting the exam results because it was dissatisfied with the racial makeup of the resulting candidate pool undoubtedly constitutes a race-based distinction. As Ricci details, Pet. Br. 6-10, New Haven officials went to great lengths pre-examination to determine that the captain and lieutenant tests were fair and truly job-related. Had a sufficient number of African-American examinees scored well enough to meet

whatever level city officials had in mind, the exam results undoubtedly would not have been rejected, but rather would have been certified by the Board of Fire Commissioners and used as the promotion list (subject to the rule-of-three). There is but one reason why that did not happen: race. Not enough African-Americans did well enough on the exam to qualify for immediate promotion, and so, New Haven asserts, it feared potential liability under Title VII.

Strict scrutiny of the City's decision is required despite its claim of a valid motive. This Court long has recognized that so-called "benign" reasons for classifying Americans by race are just as problematic as those arising from sinister aims, and has refused to exempt them from searching review. *Johnson*, 543 U.S. at 505 (Court has "insisted on strict scrutiny in every context, even for so-called 'benign' racial classifications"). The suspect nature of racial classifications in our society is such that "simple legislative assurances of good intention cannot suffice." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989).

When government uses race as a *decisive factor* in allocating opportunity or benefits, and ignores merit and classifies people based on immutable characteristics, it violates core values of Equal Protection. Even in higher education, one of the few areas in which this Court has been willing to permit *some limited* use of race, the means by which it may permissibly be considered is far more nuanced than the approach New Haven used here. Thus, in *Grutter*, the University of Michigan's law school was allowed to take race into account in its admissions

as one component of a "highly individualized, holistic review" that focused on each applicant's talents, abilities and background. *Grutter*, 539 U.S. at 337. The process did not run afoul of Equal Protection because it used race as just one factor; the individualized nature of that inquiry being deemed of "paramount" importance. (In contrast, Michigan's undergraduate admissions system, which essentially awarded "bonus points" to minority applicants, was struck down for doing just that, in the companion case of *Gratz v. Bollinger*, 539 U.S. 244 (2003)).

In contrast to the law school's highly individualized, holistic review, New Haven here appears to have simply used race in an effort to achieve racial balance – a use that *Grutter* held would be "patently unconstitutional." 539 U.S. at 330. Firefighters were told that a promotional exam would be given, and they adjusted their lives accordingly to improve their chances for advancement. Some quit or took leave from second jobs so they could study. The dyslexic among them paid to have study texts converted to audio; the expectant among them (hopefully with his wife's approval) studied in the labor and delivery room. Pet. Br. 8 & n. 4. All took the test and did well – and then all watched as New Haven decided their skin was the wrong color and threw out the results.

The decision to scrap the test results must be subjected to strict scrutiny as a racial classification.[3]

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3. Indeed, in its current posture this matter is not an employment case so much as a racial-classification case. Although the issue arises here against the backdrop of the promotional exam for New Haven's firefighters, it could just as easily happen in the context of educational admissions, distribution of government benefits or any of countless other situations.

II. Where a municipality asserts a fear of Title VII liability as a compelling interest, it should be required to establish a "strong evidentiary basis" for its assessment.

As even the City acknowledges, the lower courts simply accepted at face value its claim to have acted in part for fear of Title VII litigation. Brief in Opposition 23; *see also* Pet. App. 47a; Pet. Supp. App. 4a-6a. As Ricci suggests, that acceptance "essentially authorizes outright race balancing," which this Court never has done. Pet. Br. 34-35. We submit that this Court's precedents from the voting-rights arena can provide helpful guidance as to how strict scrutiny should apply to New Haven's claimed interest in avoiding Title VII litigation.

In *Shaw v. Hunt*, 517 U.S. 899 (1996) (*Shaw II*), the Court invalidated as a violation of Equal Protection North Carolina's creation of a majority African-American congressional district. Both the Court and Justice Stevens in dissent agreed that the mere threat of any litigation could not serve as a compelling interest for strict-scrutiny purposes. *Id* at 908-909 & n.4; 943 & n.18 (Stevens, J., dissenting). As the Court held, "a State must also have a 'strong basis in evidence' for believing that it is violating the Act. It has no such interest in avoiding meritless lawsuits." *Id* at 908-909 & n.4, citing *Shaw v. Reno*, 506 U.S. 630, 636 (1993) (*Shaw I*) and *Croson*, 488 U.S. at 500. New Haven's claimed justification should be evaluated against this "strong basis in evidence" threshold to determine whether its interest in avoiding litigation is a compelling one on these facts.

Another Equal Protection case involving public-safety promotions, *Cotter v. City of Boston*, 193 F.Supp.2d 323 (D.Mass. 2002), *aff'd. in relevant part*, 323 F.3d 160, 172 & n.10 (1st Cir. 2003), illuminates what that inquiry might look like. In *Cotter*, eight white Boston police officers challenged the promotion of three African-American officers who received lower scores on the promotional exam for sergeant. Boston cited three interests it claimed were sufficiently compelling to justify its move: the operational impact of having a racially diverse police force, the need to remedy past discrimination within the Department, and the desire to stave off litigation it claimed would have been filed by a minority-officers' association or the officers themselves. 193 F. Supp. 2d at 338. In analyzing the City's claimed desire to avoid litigation, the district court looked to *Shaw II* for guidance. 193 F. Supp. 2d 351, citing *Shaw II*, 517 U.S. at 908 n.4.[4]

A "strong basis in evidence" could be established, the court held, by "either 'a contemporaneous or antecedent finding of past discrimination by a court or other competent body,' or evidence 'approaching a prima facie case of a constitutional or statutory violation.'" *Id* at 344-345, citing *Boston Police Superior Officers Federation v. City of Boston*, 147 F.3d 13, 20 (1st Cir. 1998), *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 289 (1986), and *Croson*, 488 U.S. at 500. Thus, *Cotter* viewed *Shaw II*'s "strong basis in evidence" standard as lying somewhere between the City merely articulating

4. The court analyzed Boston's purported compelling interest in remedying past discrimination within its police department using the same standard. 193 F. Supp. 2d at 350-351.

the claimed fear and "garnering enough evidence to make out a winning case against itself." That middle ground recognizes that the public employer frequently is in a "delicate position" and "trapped" between potential liability to competing groups. *Id.* at 345, citing *Wygant*, 476 U.S. at 290-291 (O'Connor, J., concurring).

Cotter provides similar guidance in determining whether New Haven's fear of Title VII liability constitutes a sufficiently compelling interest to meet the first half of the strict-scrutiny analysis. Nor would *Shaw*'s application necessarily compel a finding that New Haven's decision to disregard the test results violated Equal Protection – in other words, strict scrutiny here need not be "strict in theory, but fatal in fact." *Adarand*, 515 U.S. at 237, citing *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980) (Marshall, J., concurring in judgment). In *Cotter*, after all, the district court found sufficiently compelling both Boston's fear of threatened litigation and the need to remedy past discrimination. Note, however, that in *Cotter* the record presented two significant factors in support of the City's determination that this record lacks: 1) a documented history of past discrimination within the department and 2) expert reports showing that, under two different measures of statistical significance, the exam had a disparate impact on African-American candidates. 193 F. Supp. 2d at 346-351. The record here contains no such evidence on New Haven's behalf; indeed the City specifically declined petitioners' request to have the test results validated.[5]

5. ADL finds *Cotter*'s reliance on a third factor somewhat more problematic. In addition to the documented history of

(Cont'd)

This Court's precedents teach that the lower courts erred in simply accepting New Haven's assertions as to its motives, and granting the City summary judgment. Rather, the courts should have undertaken the sort of analysis discussed above in the course of conducting a searching inquiry. Such probing review gives strict scrutiny its full force, and maximizes its role of ferreting out whether government in using race is acting permissibly, or insidiously:

> Absent *searching judicial inquiry* into the justification for such race-based measures, we have no way to determine what classifications are "benign" or "remedial" and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. We apply strict scrutiny to all racial classifications to "smoke out"

(Cont'd)
discrimination and expert statistical analyses supporting a finding of disparate impact, the court cited the "close watch" kept over all hiring and firing decision by the minority police officers' association as elevating the City's fear of litigation from a mere "bald assertion" to a credible threat that a lawsuit was "likely." 193 F. Supp. 2d at 351. ADL does not endorse that part of *Cotter*'s application of *Shaw*, inasmuch as it would appear to make Equal Protection rights hinge upon the degree to which another racial group "bird-dogs" the public entity's employment practices. Stated otherwise, there appears no sound basis for denying an Equal Protection claim to a police officer or firefighter in a department whose hiring and firing is closely monitored by a minority officers' group, yet affording such a claim to members of a different first-responder agency that lacks such active outside oversight.

> illegitimate uses of race by assuring that government is pursuing a goal important enough to warrant use of a highly suspect tool.

Grutter, 539 U.S. at 326 (emphasis added; brackets and some internal quotation marks deleted), quoting *Croson*, 488 U.S. at 493 (plurality opinion); *see also Parents Involved*, 127 S. Ct. at 2789 (Kennedy, J., concurring in part and concurring in the judgment).

Post-*Grutter*, courts have been far more thorough in conducting this "searching judicial inquiry" than was the district court. *See, e.g., Kohlbeck v. Omaha*, 447 F.3d 552, 555-56 (8th Cir. 2006) (fire-department affirmative-action program in which two lower-scoring African-American candidates were promoted over a higher scoring white was invalidated as not narrowly tailored, after court considered 1) efficacy of alternative remedies, 2) the flexibility and duration of the race-conscious remedy, 3) the relationship of the numerical goals to the relevant labor market and 4) the impact of the remedy on third parties).

On these facts, as the record exists to date, New Haven would seem to have little chance of showing that its fear of Title VII liability provided it a compelling interest for purposes of strict scrutiny. *See* Pet. Br. 35-36 and its discussion of evidence. However, given the erroneous approach of the lower courts, proper strict scrutiny review has yet to take place. (Moreover, New Haven may have additional evidence relevant to that inquiry). ADL submits that *Shaw II* provides a helpful framework for that analysis.

CONCLUSION

New Haven's decision to reject the promotional test results was a racial classification that should be subject to strict scrutiny. The Court therefore should remand this case and direct the district court to assess whether New Haven can in fact demonstrate a compelling governmental interest that would satisfy the "strong evidentiary basis" requirement of *Shaw II*.

Respectfully submitted,

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Supreme Court, U.S.
FILED
MAR 25 2009
OFFICE OF THE CLERK

Nos. 07-1428 & 08-328

IN THE

Supreme Court of the United States

FRANK RICCI, *et al.*,

Petitioners,

v.

JOHN DESTEFANO, *et al.*,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICI CURIAE* ASIAN AMERICAN JUSTICE CENTER, ASIAN AMERICAN INSTITUTE, ASIAN LAW CAUCUS, ET AL., IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

The Asian American Justice Center (AAJC) is a national non-profit, non-partisan organization whose mission is to advance the human and civil rights of Asian Americans. Collectively, AAJC and its Affiliates, the Asian American Institute, Asian Law Caucus, and the Asian Pacific American Legal Center of Southern California, have over 50 years of experience in providing legal public policy, advocacy, and community education. The Asian American Justice Center is one of the nation's leading experts on issues of importance to the Asian American community. AAJC and its Affiliates have a long-standing interest in this case because government actors should have the right to not certify employment test results that have a disparate impact on a racial minority, including Asian Americans. This interest has resulted in AAJC's participation in a number of administrative rulemaking comments and *amicus* briefs before the courts.

Joining AAJC as *amici curiae* in this brief are other public interest legal and civil rights organizations that are also dedicated to advancing

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[1] In accordance with Supreme Court Rule 37.3(a), Amici Curiae have filed with the Clerk of the Court letters from Petitioners and Respondents consenting to the filing of this brief. No person or entity other than Amici Curiae, their members, or their counsel made a monetary contribution to the preparations or submission of the brief, and no counsel for Petitioners or Respondents had any role in authoring this brief.

the interests and protecting the rights of all Americans, including Asian Americans (collectively, "*Amici*"). *Amici* represent a broad range of Asian American ethnicities as well as non-Asian American groups, including some of the largest and oldest Asian American organizations in this country that are involved in challenging racial discrimination, safeguarding civil rights, and ensuring equal opportunity for all. Amici thus have an important and substantial interest in this case, which raises crucial questions concerning freedom of government actors to voluntarily comply with Title VII's and this Court's prohibition against using employment tests that have a disparate impact on a protected class.

INTRODUCTION AND SUMMARY OF ARGUMENT

Asian Americans bring a unique perspective to this case. The history of pervasive discrimination against this group supports Respondents' decision to not certify the test results. *Amici* submit this brief to demonstrate that the forced certification of test results that are non-compliant with federal guidelines will severely undermine Asian Americans' protection from discrimination and the ability of employers to take fair, lawful and commonsense measures to ensure equal opportunity for all workers.

Asian Americans have been subject to a historical pattern of discrimination that has led to structural disparities in employment, including in firefighting. This discrimination is often rooted in unfair and inaccurate stereotypes, such as the view of Asian

Americans as perpetual foreigners that cannot be trusted or assimilated, or as model minorities that require no assistance in overcoming societal prejudice. These stereotypes have led to overt expressions of state-sponsored discrimination, such as laws against owning land, and the Japanese American internment. But these stereotypes also manifest themselves in more subtle, although no less insidious, ways. Rooting out this less overt discrimination lies at the heart of this case.

Today, there are far fewer Asian American firefighters nationwide than their overall population numbers would suggest. There is only one Asian American in the entire City of New Haven Fire Department, and, notably, not a single Asian American took the promotional exams in question. The near-total absence of Asian American firefighters in the entire department supports an effort by the city to ensure that its employment tests are fair, lawful and promote equal opportunity. The historical legacy of discrimination against Asian Americans and other minorities makes it incumbent on government actors to avoid employment practices that will perpetuate racial disparities. If a test proves to be discriminatory, the city has a responsibility to seek better, lawful alternatives.

Petitioners' position would undermine decades of efforts by Congress and this Court to ameliorate structural inequities. Respondents' employment tests yielded results that, under federal employment guidelines, indicated an adverse racial impact. They correctly chose not to certify these results.

For all of these reasons, *Amici* support Respondents' reasonable and well thought-out decision not to certify the test results. Accordingly, *Amici* respectfully request that this Court affirm the judgment of the Second Circuit.

ARGUMENT

I. THE HISTORY AND PERSISTENCE OF DISCRIMINATION AGAINST ASIAN AMERICANS SUPPORTS ALLOWING A GOVERNMENT ACTOR'S DECISION TO NOT CERTIFY TEST RESULTS THAT HAVE A DISPARATE IMPACT.

In the face of the historical legacy of discrimination against Asian Americans, as well as other racial minority groups, the Court should encourage, not restrain, the ability of government actors to comply with the letter and spirit of anti-discrimination laws. For this reason, *Amici* support Respondents' decision to not certify the results of a firefighters' promotion exam and, in the process, abandon an advancement process which perpetuates entrenched discrimination.

For Title VII and Equal Protection jurisprudence to fulfill their intended purpose of combating discrimination, government actors must have the freedom to take steps to address problems in job sectors with structural racial inequality. The firefighting forces, in particular, have a history of segregation against minority ethnic groups, including Asian Americans. In fact, the absence of Asian Americans in *Ricci v. DeStefano*, 554 F. Supp.

2d 142 (D. Conn. 2006) ("*Ricci*"), highlights a broader lack of Asian Americans in the firefighting forces nationally that is rooted in a legacy of discrimination against Asian Americans. Petitioners' position would undermine decades of programs meant to ameliorate these structural problems and would undercut the anti-discrimination statutory scheme.

A. Asian Americans have a history of exclusion from public sector jobs, including firefighter positions.

Historically, Asian Americans have suffered discrimination and were denied jobs in firefighting and other protective services. The case of the San Francisco Fire Department is illustrative of the discriminatory exclusion suffered by Asian Americans. During the mid-1960s, there were only six Asian Americans (and one African American) among approximately 1,600 firefighters in the department.[2] *See* Paul M. Ong, *The Affirmative Action Divide, in Transforming Race Relations* 377 (Paul M. Ong ed., 2000), *reprinted in* Don Nakanishi & James S. Lai, *Asian American Politics: Law, Participation, and Policy* 393-94 (2003) ("During the mid-1960s, when community leaders first raised the issue of under representation, only six [Asian

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[2] During this time period, Asian Americans comprised about 13.3 percent of the population of San Francisco. *See* U.S. Dep't of Commerce, Bureau of the Census, *Race of the Population by County: 1970 Supplementary Report* (1975), *available at* http://www2.census.gov/prod2/decennial/documents/31679801n104-107.pdf (last visited Mar. 24, 2009).

Americans] (and one [African American]) were among approximately 1,600 firefighters, and that number remained essentially the same for a decade."). By 1974, there were only four Asian Americans in the San Francisco Fire Department. Gabriel J. Chin et al., *Beyond Self-Interest: Asian Pacific Americans Toward a Community of Justice*, 4 Asian Pac. Am. L.J. 129, 155 (1996).

Under a 1974 court order, the department was expected to increase the number of Asian American firefighters. *See* Nakanishi & Lai, *supra* p.7, at 394; *see also* Asian American Justice Center, *Equal Access: Unlocking Government Doors for Asian American Businesses* 20 (2008). Despite the order, discrimination and disparity persisted. In 1978, a written test for promotion to the Lieutenant position in the San Francisco Fire Department had a pass rate ratio of Asian American firefighters to non-Hispanic white firefighters of only 13 percent. *United States v. City & County of San Francisco*, 696 F. Supp. 1287, 1294 (N.D. Cal. 1988), *aff'd sub nom. Davis v. City & County of San Francisco*, 890 F.2d 1438 (9th Cir. 1989), *cert. denied, sub nom. San Francisco Fire Fighters Local 798 & Int'l Ass'n of Fire Fighters, AFL-CIO v. City & County of San Francisco*, 498 U.S. 897 (1990).

The situation did not improve in the ensuing years. In 1988, not one Asian American held any of the 352 permanent supervisory positions in the San Francisco Fire Department. *Id.* At the same time, only four positions (1%) were held by African Americans and sixteen positions (5%) were held by Hispanic Americans, and only one member of a

minority group held a rank above Captain. *Id.* Moreover, the San Francisco Fire Department, by its own admission, had not committed any resources to investigate claims of racial harassment. *Id.* The department was, and is, emblematic of the gross disparity that Asian Americans face in public sector positions.[3] To this day, San Francisco has relatively few Asian Americans in the firefighting forces, including appointed positions. *See* Angela Pang, *Asian Americans Who Run the City*, Asian Week, Feb. 22, 2008 (discussing the low number of Asian Americans in the city's appointed positions, including within the fire department).

The disparities in San Francisco are reflected nationwide in firefighting and other protective service positions. *See* Nakanishi & Lai, *supra* p.6, at 393. Asian Americans represent less than 1.5 percent of all firefighters nationwide, far lower than their overall population numbers would suggest.[4] U.S. Equal Employment Opportunity Commission, Job Patterns For Minorities And Women In Private

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[3] A 1992 study of city employment in San Francisco revealed that fewer than half of the municipality's departments met the 1990 census workforce parity figure of 2.9 percent. Chin, *supra* p.6, at 154. The same study showed that parity rates for Asian Americans in city hall and the police department were 50 percent or less. *Id.* Periodic studies indicated that parity rates were declining during the 1990s. *See id.*

[4] Asian Americans comprise about 4.4 percent of the American population. U.S. Census Bureau, State & County QuickFacts, USA, *available at* http://quickfacts.census.gov/qfd/states/00000.html (last visited Mar. 24, 2009),

Industry, State and Local Government Information (EEO-4), National Employment Summary 39 (2005), *available at* http://www.eeoc.gov/stats/jobpat_eeo4/2005/jobs.pdf (last visited Mar. 24, 2009).[5]

Of the more than 118 test takers in *Ricci*, not one was identified by the District Court as Asian American. *See Ricci*, 554 F. Supp. 2d at 145 (discussing the ethnic breakdown of the test takers). It is notable that not a single Asian American took the written exam.[6] In fact, of the 366 firefighters in the City of New Haven, there is only one Asian American. [7] In light of the Asian American experience with the firefighting and protective service professions, this gap illustrates how "[t]he application process itself might not adequately reflect the actual potential applicant pool, since *otherwise qualified people* might be discouraged from applying because of a self-recognized inability to meet the very standards challenged as being

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[5] Similarly, Asian Americans also represent less than 1.5 percent of those with protective service jobs. U.S. Equal Employment Opportunity Commission, *supra* p.8, at 7.

[6] This is despite the fact that Asian Americans constitute approximately 4 percent of the City of New Haven, roughly commensurate with its proportion of the overall U.S. population. U.S. Census Bureau, State & County QuickFacts, New Haven, Connecticut, *available at* http://quickfacts.census.gov/qfd/states/09/0952000.html (last visited Mar. 24, 2009).

[7] *See* City of New Haven, *State & Local Gov't Info. Report EEO-4* (2007).

discriminatory." *Dothard v. Rolinson*, 433 U.S. 321, 330 (1977) (emphasis added) (holding that the statutory height and weight standards had a discriminatory impact on women applicants and would discourage women from applying for the job). In any event, these numbers are stark. The "glaring absence" of Asian American firefighters is indicative of what appears to be serious racial disparities within the City of New Haven's Fire Department. *See Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324, 342 n.23 (1977).[8]

B. Asian Americans continue to face discrimination, damaging stereotypes and a glass ceiling on achievement.

Discrimination against Asian Americans continues to be reflected in many aspects of society beyond firefighting and protective services. "Like African Americans and Hispanic Americans, [Asian Americans] are victims of both past and present discrimination." Harvey Gee, *Changing Landscapes: The Need for Asian Americans To Be Included in the Affirmative Action Debate*, 32 Gonz. L. Rev. 621, 625 (1996-97) (citation omitted). Asian Americans have

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[8] Justice O'Connor remarked in a concurring opinion that, when large numbers are involved, the "inexorable zero" is all the justification needed for some kind of response. *Johnson v. Transp. Agency*, 480 U.S. 616, 656-67 (1987) ("[F]ine tuning of the statistics could not have obscured the glaring absence of minority line drivers. . . . [T]he company's inability to rebut the inference of discrimination came not from a misuse of statistics but from the inexorable zero." (citation and internal quotation marks omitted)).

faced anti-Asian sentiment that has prolonged ethnic salience and contributed to a structural racial disparity.[9] Because of this history and persistent discrimination, government actors must be able to seek alternative methodologies for hiring and promoting when current methodologies appear flawed.

1. The stereotyping of Asian Americans as perpetual foreigners has contributed to structural racial inequality in many areas, including employment.

The stereotype of Asian Americans as perpetual foreigners contributes to deep-rooted discrimination against this group, especially regarding workplace advancement.[10] Too often, Asian Americans are complimented on their English-speaking abilities and asked where they are "really" from, implying that Asian Americans are not truly American,

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[9] As with other racial minority groups, these disparities are often rooted in broader social and cultural views that are difficult to pinpoint and even more difficult to modify or extinguish. *See, e.g.*, Natsu Taylor Saito, *Alien and Non-Alien Alike: Citizenship, "Foreignness," and Racial Hierarchy in American Law*, 76 Or. L. Rev. 261 (1997) (discussing the identification of Asian Americans as intrinsically "foreign").

[10] *See generally* Charles J. McClain, *In Search of Equality: The Chinese Struggle Against Discrimination in Nineteenth-Century America* (1994) (cataloguing the history framework and pattern of treatment of Asian Americans based upon a "perpetual foreigner" stereotype); William Petersen, *Success Story, Japanese-American Style*, N.Y. Times Mag., Jan. 9, 1966 (attributing success of Japanese Americans to their foreign roots and non-American culture).

regardless of how long they or their ancestors have been living in the United States. *See* William Wei, *The Asian American Movement* 44 (1994). When Asian Americans are indiscriminately painted with the broad brush of "foreigner," notwithstanding the actual backgrounds of individual Asian Americans, this implicates an array of possible negative inferences such as disloyalty and lack of patriotism. *See* Neil Gotanda, *Asian American Rights and the "Miss Saigon Syndrome," in Asian Americans and the Supreme Court: A Documentary History* 1098-99 (Hyung-Chan Kim ed., 1992).[11] It is not difficult to imagine how prejudice rooted in the notion of the perpetual foreigner could play a role in the hiring and promoting of Asian Americans in the firefighting forces, a public sector position, along with the police

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[11] Asian American studies scholars point to the Dr. Wen Ho Lee case as perhaps the most prominent, modern-day example of the perpetual foreigner stereotype. This case involved the U.S. Justice Department's harsh detention and investigation of Dr. Wen Ho Lee, a Chinese American scientist with the U.S. Energy Department, regarding the sharing of classified government information about nuclear weapons with China. Many Asian American activists believed that Dr. Lee's ethnicity was a significant, if not primary, impetus behind the investigation. *See* Miranda Oshige McGowan & James Lindgren, *Testing the "Model Minority Myth"*, 100 Nw. U.L. Rev. 311, 344 (2006). Dr. Lee's motion to grant bail was blocked at the last minute and the U.S. Attorney argued that keeping Dr. Lee in arguably inhumane confinement conditions was fully justified. *See* James Steingold, *Accused Scientist Has Bail Blocked at Last Minute*, N.Y. Times, Sept. 2, 2000, at A1.

force, that is strongly associated with patriotic sentiment.[12]

The prejudice behind the perpetual foreigner stereotype has had negative manifestations throughout the United States. A range of city ordinances, state and federal legislation, and court rulings have prevented Asian Americans from employment with public agencies or corporations,[13] subjected Asian Americans to the special imposition of taxes based on race,[14] restricted Asian Americans

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[12] *See generally* Thomas Ambrosio, *Ethnic Identity Groups and U.S. Foreign Policy* 133-36 (2002) (discussing the history of how Asian Americans came to be viewed as "permanent foreigners," precluding Asian Americans from becoming "real Americans"); Keith Aoki, *"Foreignness" & Asian American Identities: Yellowface, World War II Propaganda, and Bifurcated Racial Stereotypes*, 4 Asian Pac. Am. L.J. 1 (1996); Natsu Taylor Saito, *Model Minority, Yellow Peril: Functions of "Foreignness" in the Construction of Asian American Legal Identity*, 4 Asian L.J. 71 (1997).

[13] Robert C. Berring, Review Essay, *In Search of Equality: The Chinese Struggle Against Discrimination in Nineteenth-Century America* by Charles J. McClain (1995), 2 Asian Am. L.J. 87, 94 (describing how Article XIX of the California Constitution banned Asian Americans from employment by corporations and public agencies).

[14] *See* Hyunh-Chan Kim, *A Legal History of Asian Americans, 1790-1990* 48-49 (1994) (listing a series of taxes passed from 1850 to 1862 that targeted Chinese Americans in California, such as the Foreign Miners' Tax (taxing miners ineligible for citizenship), the Foreign Miners' License Tax (requiring all foreigners ineligible for citizenship to purchase a miner's license regardless of occupation), and the Chinese Police Tax (imposing a head tax on all adult Chinese Americans)).

from entrepreneurial ventures, [15] and prevented Asian Americans from owning land,[16] which in turn led to restrictions in their agricultural endeavors.[17] These discriminatory laws permeated nearly all aspects of Asian American life and were upheld by the Supreme Court. [18] The last of these discriminatory laws were not repealed or struck down until the early 1950's. [19] Nonetheless, the

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[15] *See Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886) (striking down ordinances that restricted the economic growth and advancement of Chinese laundries as a violation of equal protection because of the discriminatory manner in which they were enforced); *see also* Kim, *supra* n.14, at 94 (documenting the harassment Chinese importers and laundrymen experienced).

[16] *See* Dudley O. McGovney, *The Anti-Japanese Land Laws of California and Ten Other States*, 35 Cal. L. Rev. 7 (1947) (detailing the history of preclusion of Japanese Americans from land-ownership in eleven states).

[17] *See* Angelo N. Ancheta, *Race, Rights and the Asian American Experience* 29 (1998) (discussing how California's Alien Land Law of 1913 prevented Japanese from establishing agricultural businesses by prohibiting Japanese persons ineligible for citizenship from purchasing land in the state and by limiting lease terms to three years or less).

[18] *See, e.g., Porterfield v. Webb*, 263 U.S. 225 (1923) (upholding the Alien Land Act of California); *Terrace v. Thompson*, 263 U.S. 197 (1923) (affirming similar Washington state discriminatory land law).

[19] *See, e.g., Fujii v. State*, 242 P.2d 617 (Cal. 1952) (holding that the Alien Land Act of California violated the Fourteenth Amendment of the Constitution).

discrimination continues to impact nearly all aspects of Asian American life.[20]

The Japanese American internment was perhaps the most tragic, and insidious, manifestation of the perpetual foreigner stereotype. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 215 n.* (1995); *see also* Pub. L. No. 100-383, § 2(a), 102 Stat. 903 (1988) ("The Congress recognizes that . . . a grave injustice was done to both citizens and permanent resident aliens of Japanese ancestry by the evacuation, relocation, and internment of civilians during World War II."). The internment experience shows that the perpetual foreigner stereotype contributes, in a real way, to active discrimination and a structural racial disparity.[21]

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[20] *See, e.g.*, Ancheta, *supra* n.17, at 30 (discussing Asian American discrimination in their pursuit of marriage, noting that laws prohibiting intermarriage with Asians were "common in Western states, and many laws remained on the books until the United States Supreme Court ruled them to be unconstitutional in [*Loving v. Virginia*, 388 U.S. 1 (1967)]"); Ronald Takaki, *A History of Asian Americans: Strangers From A Different Shore* 201 (1998) (discussing Asian American discrimination in their pursuit of education, stating that "the San Francisco Board of Education directed principals to send all Chinese, Japanese and Korean children to the Oriental School") (citations and internal quotations omitted); *see also Lum v. Rice*, 275 U.S. 78, 86-87 (1927) (applying separate-but-equal doctrine of *Plessy v. Ferguson*, 163 U.S. 537 (1896), to Chinese citizens).

[21] *See* Natsu Taylor Saito, *Beyond Reparations: Accommodating Wrongs or Honoring Resistance?*, 1 Hastings Race & Poverty L.J. 27, 35 (2003) (discussing the "well-entrenched pattern of discrimination rooted in a racialized identification of Asian Americans as perpetually 'foreign'" and *(cont'd)*

This xenophobic and inaccurate perception of Asian Americans helps explain the long-standing history of discrimination against Asian Americans and clarifies why Asian Americans are underrepresented in public sector jobs.

2. The perception of Asian Americans as the model minority has had damaging effects on the ability of Asian Americans to obtain promotions.

At the same time Asian Americans have been subject to the perpetual foreigner stereotype, they have also had to deal with the burden of being perceived as the "model minority." Commonly referred to as the "model minority myth," this stereotype also plays a major role in suppressing Asian American advancement in the workplace.[22] It assumes that all Asian Americans are extremely hard working, intelligent, highly educated and

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providing a litany of laws exemplifying that much of what led to "internment persists not just in popular culture, but in the structures of law as well").

[22] The popular media created the model minority myth in 1966 through two articles in The New York Times Magazine and U.S. News & World Report. Petersen, *supra* n.10, at 20; *Success Story of One Minority Group in the U.S.*, U.S. News & World Rep., Dec 26, 1966, at 73, *reprinted in Roots: An Asian American Reader* 6, 6 (Amy Tachiki et al. eds., 1971). Both articles delivered Asian Americans the backhanded compliment of working hard at any job, valuing education, insisting that their children excel in school, combining resources to help each other get ahead and moving to the suburbs as they amass more wealth.

economically successful. *See* Miranda Oshige McGowan & James Lindgren, *Testing the "Model Minority Myth,"* 100 Nw. U.L. Rev. 311, 335 (2006). While the stereotype may seem to implicate positive attributes, most scholars agree that the stereotype itself has negative effects. *See generally* Frank Wu, *Yellow: Race in America Beyond Black and White* (2003) (positing that widespread stereotyping of Asian Americans is inherently damaging); *see also* Pat K. Chow, *Asian Americans: The "Reticent" Minority and Their Paradoxes*, 36 Wm. & Mary L. Rev. 1, 24 (1994) (summarizing the model minority myth that "Asian Americans, through their hard work, intelligence, and emphasis on education and achievement, have been successful in American society"). Lumping this large, diverse community into one stereotype ignores the poverty and low levels of education that many Asian Americans face, such as those from Cambodia, Vietnam and Laos.

In addition to overlooking significant Asian American populations, the model minority myth causes further damage by "persuad[ing] people that Asians need no help in attaining economic and educational success." *See, e.g.*, Chow, *supra* p.16; *see also McGowan & Lindgren, supra* n.11, at 336. The phrase "model minority" inherently pits one minority group against others; after all, if one ethnic group is the "model," then other ethnic groups must be less than ideal. Perhaps even more troubling, and blatantly untrue, is the logical endpoint of the model minority myth: that all Asian Americans are

"successful" so that therefore they must not be subject to societal discrimination.[23]

This myth—and the false conclusions that are derived from it—hinders an honest assessment of the real obstacles that Asian Americans face in the workplace. Critical analysis of the underlying reasons for the severe disparities in public sector employment that Asian Americans face cannot occur when articles in the media glibly declare that "Asian Americans are smarter than the rest of us." Anthony Ramirez, *America's Super Minority*, Fortune, Nov. 24, 1986, at 148, 149. These types of inaccurate and misleading stories create the impression that Asian Americans can independently overcome any obstacles they encounter in reaching the highest ranks of corporate America – they simply need to adapt to American management culture. *Id.* This type of reasoning, itself rooted in stereotype, casually ignores the real history of discrimination and segregation suffered by the Asian American community, which continues to grapple with the after-effects to this day. It implies that Asian

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[23] Researchers at Northwestern University School of Law used data from the General Social Survey to determine the degree to which non-Hispanic whites, Hispanic Americans and African Americans hold positive views of Asian Americans while simultaneously believing Asian Americans to be unpatriotic, foreign, or inassimilable. McGowan & Lindgren, *supra* n.11, at 332. The results of their study showed that "[t]hose who hold positive views of Asians as hard working or intelligent are indeed more likely to believe that there is little or no discrimination against Asian Americans in jobs and housing." *Id.* at 333.

Americans' ability to adapt to corporate culture is their problem alone and they alone can provide a solution.[24]

3. The stereotypes have manifested themselves into a "glass ceiling" on Asian American progress in the workplace.

Both the perpetual foreigner stereotype and the model minority myth have played key roles in erecting barriers to Asian American workplace advancement. Asian Americans face a "glass ceiling," which refers to a set of often informal barriers preventing many minorities and women from moving into higher management positions.[25]

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[24] Today, the myth persists – earlier this year Forbes magazine ran an article (authored by Jason Richwine of the American Enterprise Institute) declaring that Indian Americans are the new model minority. A critique of the Forbes article echoed what academic critics have been arguing for decades: that the term "model minority" is not a compliment but "an attempt to fit a diverse community into an oversimplified box" and that "being called a "model minority" is an unwelcome characterization that is damaging and tough to overcome. "[This is why] the 'old' model minorities – East Asian Americans – have struggled to shed the label since they were first saddled with it in the 1960s because of 'their advanced educations and high earnings.'" Shiwani Srivastava, *Nobody's Model Minority*, The Root (March 16, 2009), *available at* http://www.theroot.com/views/nobodys-model-minority (last visited Mar. 24, 2009).

[25] *See generally* Wu, *supra* p.16, at 163 (discussing the glass ceiling faced by Asian Americans in the workforce and for government contracts); *see also* Deborah Woo, The Glass Ceiling and Asian Americans: A Research Monograph 42 (July, 1994) (unpublished manuscript), *available at*

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Studies by various federal agencies, including the United States Commission on Civil Rights, the Equal Employment Opportunity Commission, and the Federal Glass Ceiling Commission, have all found that despite achieving higher levels of education than other groups, Asian Americans have not experienced corresponding upward mobility—either in terms of higher incomes or promotions.[26] Asian American men born in the United States are 7-11 percent less likely to be in managerial occupations than non-Hispanic white men with the same education, work experience, marital status, and English ability.[27] The disparity is just as stark for Asian American women.[28] Similar patterns of disparity are apparent in 2005 data for firms with at least 100 employees, where only 8.6 percent of Asian

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http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1130&context=key_workplace (last visited Mar. 24, 2009).

[26] For a summary of these findings, *see* Asian American Institute, *Asian Americans and Public Contracting: Equal Opportunities, Laws, and Policies* 19-20 (2008), *available at* http://www.advancingequality.org/attachments/files/220/Equal_Opportunity_Laws.pdf (last visited Mar. 24, 2009).

[27] U.S. Commission on Civil Rights, *Civil Rights Issues Facing Asian Americans in the 1990's* (1992); *see also* Asian American Institute, *supra* n.26, at 19-20 (discussing research that evidences an approximate 10% income disparity between Asian Americans and Non-Hispanic white Americans (citing LEAP Asian Pacific American Pub. Policy Inst. & UCLA Asian Americans Studies Ctr., *The State of Asian Pacific America: Policy Issues to the Year* (2000))).

[28] *Id.*

Americans are in management positions compared to 13.2 percent of whites. *See* U.S. Equal Employment Opportunity Commission, *supra* at 8. The same holds true for promotion into the highest career levels in the federal government, even after controlling for a number of personal characteristics, revealing an unexplained racial residual effect.[29] In 1994, the United States Commission on Civil Rights found that being of "Asian descent" had a "negative effect" on an employee's chance to move upward into management. *See* Woo, *supra* n.25, at 42 (citing to the U.S. Commission on Civil Rights, *Economic Status of Americans of Asian Descent: An Exploratory Investigation* (1988)). Employer biases and stereotypes play a major role in crafting the glass ceiling.[30]

If the Court follows Petitioners' position, it will undermine decades of programs and laws meant to combat historical and pervasive discrimination in society. Subtle, institutionalized prejudice is often

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[29] *See generally* Jeremy S. Wu and Carson K. Eoyang, *Asian Pacific American Senior Executives in the Federal Government*, AAPI Nexus, Vol. 4, No. 1, Winter/Spring 2006, 39-50 (calling attention to the lack of workforce diversity in promoting Asian Americans to the highest career levels in the federal government).

[30] *See* Vu H. Pham, Lauren Emiko Hokoyama, & J.D. Hokoyama, *Become Visible: Let Your Voice Be Heard*, AAPI Nexus, Vol. 4, No. 1, Winter/Spring 2006 Essay, 1-11 (arguing that under-representation is not due to a lack of skills or interest but because Asian Americans lack role models and mentors as they are not perceived as "leadership material").

persistent, but difficult to expose.[31] Stereotypes such as the model minority myth and the perpetual foreigner stereotype may very well explain why Asian Americans continue to earn less money than their less-educated non-Hispanic white counterparts.[32] Asian Americans face a glass ceiling, constructed by decades of damaging stereotypes, that has been dented slowly over time, thanks in part to the principle of equal protection and Title VII.. In the face of this stark historical record, the Court should not restrain the ability of government actors to foster equal opportunity in the workplace.

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[31] For example, a San Francisco employment study revealed that Asian Americans are over-parity on a city-wide basis, but a breakdown of the numbers reveals that Asian Americans are under-parity as police officers, firefighters, or attorneys even though they are over-parity as engineers, accountants, analysts, and technicians. *See* Chin, *supra* p.6, at 155-56. (discussing how statistics "evidencing parity" are in fact misleading and obscures discrimination against Asian Americans by failing to take into account qualitative differences in treatment afforded Asian Americans and obscuring areas where Asian Americans are woefully under represented).

[32] Asian American Institute, *supra* n.26, at 19-20 (discussing research that evidences an approximate 10% income disparity between Asian Americans and Non-Hispanic whites Americans (citing LEAP Asian Pacific American Pub. Policy Inst. & UCLA Asian Americans Studies Ctr., *The State of Asian Pacific America: Policy Issues to the Year* (2000))).

II. AVOIDING EMPLOYEE ADVANCEMENT PROCEDURES THAT PERPETUATE RACIAL DISPARITY IS A REASONABLE METHOD OF PREVENTING WORKPLACE DISCRIMINATION.

Asian Americans are keenly aware of the need for government actors to address structural racial inequalities, often rooted in a historical legacy of discrimination and prejudice, through voluntary compliance with Title VII. Given the continuing gross disparities in the numbers and advancement potential of Asian Americans firefighters and other protective service personnel, as discussed *supra*, Title VII is as important as ever.

In light of a record of past discrimination that continues to affect minorities today, government actors are obligated to avoid employee advancement methodologies that needlessly perpetuate racial disparity. This history should inform the Court's examination of the City of New Haven's efforts to use non-biased selection procedures, and whether this should trigger strict scrutiny review. Forcing a government actor to use a test that is not compliant with federal guidelines and evidences an adverse racial impact is clearly contrary to the purpose of Title VII itself: freedom from discrimination.[33]

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[33] In broad terms, the desire to combat discrimination was the reason Congress enacted the Civil Rights Act of 1964, of which Title VII is a part, as the title of the Act makes clear. *See* Pub. L. No. 88-352, 78 Stat. 241 (1964) (1964 Civil Rights Act was to address "discrimination in public accommodations," *(cont'd)*

Petitioners put forth two principal arguments for why strict scrutiny should apply: (1) race was the "predominant factor" in Respondents' decision to not certify the test results, Pet'r Br. *Ricci*, at 24; and (2) Respondents acted with a racial purpose. *Id.* at 24-25.

Both arguments fail because they wholly mischaracterize Respondents' actions. The City of New Haven reacted in a race-neutral way to a test that, under federal guidelines, had a disparate racial impact.[34] For the anti-discrimination framework to succeed, government actors must be free to make reasonable decisions to avoid a disparate impact on a protected class, and ensure that all employees are treated equally.[35] Such compliance avoids unlawful discrimination and furthers judicial economy.

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"prevent discrimination in federally assisted programs," and "for other purposes"). Congress has further clarified its view of the anti-discriminatory purposes underlying Title VII through various amendments. *See, e.g.*, Pub. L. No. 111-2, § 2, 123 Stat. 5 (Lilly Ledbetter Fair Pay Act of 2009 expands time period in which "victims of discrimination can challenge and recover for discriminatory compensation decisions or other practices"); Pub. L. No. 111-1, § 3, 105 Stat. 1071 (1991 Civil Rights Act was designed "to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination").

[34] *See* Part II.A., *infra*.

[35] *See* 42 U.S.C. § 2000e-2(h) (Title VII permits employment tests as long as they are "not designed, intended or used to discriminate because of race, color, religion, sex or national *(cont'd)*

Accordingly, *Amici* encourage the Court to find that strict scrutiny does not apply because the City of New Haven did not use a racial classification and did not have a discriminatory purpose.[36]

A. Respondents' attempts to implement fair and legal advancement methodologies do not amount to racial classification and do not trigger strict scrutiny.

Petitioners and their supporters argue that they were subject to improper racial classification. Pet'r Br. *Ricci*, at 23.[37] They assert that Respondents

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origin"); *see also Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (holding that internal transfer and promotion methodologies which relied on high school education requirements and threshold scores on broad aptitude tests had a disparate impact on minority ethnic groups).

[36] *Amici* incorporate Respondents' arguments that Respondents had a compelling interest in complying with Title VII's disparate impact provisions. Resp't Br. *Ricci*, at 49-55. Amici also incorporate by reference Respondents' arguments that the non-certification of the test results was, by definition, narrowly tailored to achieve the compelling interest in avoiding a potential violation of Title VII. Resp't Br. *Ricci*, at 55-57.

[37] *See also* Brief for Joe Oakley et al. as *Amicus Curiae* Supporting Petitioner, *Ricci*, at 2 ("In canceling a content-valid civil service promotions process solely because the test results indicated that not enough minority applicants qualified for promotions, the City of New Haven acted in a manner that the Equal Protection Clause, and this Court, simply cannot countenance."); Brief for the Eagle Forum Education & Legal Defense Fund as *Amicus Curiae* Supporting Petitioner, *Ricci*, at 6 ("Respondents used individual racial classifications to distribute burdens and cause each Petitioner to be

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disliked the racial breakdown of the test results and acted accordingly. *Id.* [38] Relying in part on *Adarand*,[39] Petitioners and their supporters argue

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disadvantaged because of his or her race." (citation and internal quotations omitted)); Brief for the Anti-Defamation League as *Amicus Curiae* Supporting Petitioner, *Ricci*, at 5 ("New Haven's conduct in rejecting the exam results because it was dissatisfied with the racial makeup of the resulting candidate pool undoubtedly constituted a race based distinction."); Brief for the National Association of Police Organizations as *Amicus Curiae* Supporting Petitioner, *Ricci*, at 6 ("Whether the Board engaged in race-based decisionmaking is not in dispute here. The lower court found as a matter of fact that it did. . . ."); Brief for the Concerned American Firefighters Association as *Amicus Curiae* Supporting Petitioner, *Ricci*, at 3 ("In this case, the District Court and the United States Court of Appeals for the Second Circuit declined to confront the fact that a racial classification was used by the CSB, and therefore its failure to apply strict scrutiny was manifestly in error.").

[38] "Using race-coded lists to determine whether to certify, the city and its officials acted on raw racial labels and distributions ... Petitioners were treated unequally because of their race: they were refused promotions only because they were white." Pet'r Br. Ricci, at 23.

[39] In *Adarand*, the Court concluded that strict scrutiny applies to a federal set-aside program that on its face provides financial incentives to hire minority subcontractors. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995). The law at issue in that case gave general contractors on government projects a financial incentive to hire subcontractors operated by individuals historically subjected to racial or ethnic prejudice. *Id.* at 206. This was not a facially neutral law. It treated parties differently based on race; minority-owned businesses were preferred over non-minority owned businesses. *Id.* (applying strict scrutiny where the contract at issue stated that

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that Respondents' decision to not certify the test results should be construed as a facial classification which expressly distinguishes between applicants on the basis of race.

Adarand is simply not applicable here. [40] Respondents had no incentive to hire a minority candidate over a non-minority one.[41] Instead, this case deals with a facially neutral decision where all parties were treated exactly the same. Whereas the law in question in *Adarand* conferred an explicit advantage on minority-owned businesses, Respondents' attempts to ensure that the promotion process was fair, unbiased and compliant with relevant federal guidelines did not give minority candidates an advantage over non-minority candidates. By disregarding *all* of the test scores, Respondents treated all applicants equally and avoided a potential violation of Title VII. *Id.* This case is therefore not one where the "racial classification" was on the face of the statute or

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the contractor would receive additional compensation if it hired subcontractors certified as small businesses controlled by "socially and economically disadvantaged individuals").

[40] *Amici* incorporate by reference Respondents' discussion of how this is not a case of racial classification, unlike the law in *Adarand*. Resp't Br. *Ricci*, at 41-42.

[41] *Amici* also incorporate by reference Respondents' arguments that declining to certify the test results did not entail racial classifications triggering strict scrutiny. Resp't Br. *Ricci*, at 41-44.

policy, and which distinguished between people on the basis of race.[42]

Petitioners' position—that Respondents engaged in racial classification—would turn the anti-discrimination statutory scheme on its head. Government actors, seeking to effect Title VII-compliant remedies to potentially discriminatory hiring and promotion methods, would instead have their hands tied in the name of anti-discrimination. Yet, often the clearest evidence of actual discrimination is in the pass ratio of an employment test. *See, e.g., United States v. City & County of San Francisco*, 696 F. Supp. 1287, 1294 (N.D. Cal. 1988) (finding a pass rate ratio of Asian American firefighters to Non-Hispanic whites firefighters of only 13 percent evidences discrimination), *aff'd sub nom. Davis v. City & County of San Francisco*, 890 F.2d 1438 (9th Cir. 1989), *cert. denied, sub nom. San Francisco Fire Fighters Local 798 & Int'l Ass'n of Fire Fighters, AFL-CIO v. City & County of San Francisco*, 498 U.S. 897 (1990). Petitioners' argument would only serve to undercut the ability of Title VII to address structural racial inequality.

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[42] *See, e.g., Loving v. Virginia*, 388 U.S. 1, 11-12 (1967) (invalidating a miscegenation statute which, on its face, prohibited interracial marriages); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 282-84 (1986) (invalidating a school board plan which expressly utilized race-based preferences in teacher lay-offs).

B. It is critical to the functioning of Title VII that government actors not be liable for reasonable efforts to address promotion methodologies that would (1) perpetuate racial disparity and (2) not comply with federal guidelines.

Petitioners' brief contends that the City of New Haven *intended* to treat candidates differently on the basis of their race or ethnicity by not certifying the promotion exams. Pet'r Br. *Ricci*, at 25.[43] This

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[43] *See also* Brief for Joe Oakley et al. as *Amicus Curiae* Supporting Petitioner, *Ricci*, at 5 ("[Petioners' efforts] were ultimately futile because a municipal government believed it could make an intentional, race-based determination to cancel a content-valid promotions process using the EEOC guidelines as a shield."); Brief for the National Association of Police Organizations as *Amicus Curiae* Supporting Petitioner, *Ricci*, at 11 ("Thus, when the Board acted from its concern that 'too many whites . . . would be promoted were the lists to be certified' it discriminated against those 'whites' that passed the exam but were ordered returned to square one." (citing *Ricci v. Destafano*, 554 F. Supp. 2d 142, 152 (D. Conn 2006))); Brief for the Center for Individual Rights, et al. as *Amicus Curiae* Supporting Petitioner, *Ricci*, at 8 ("Here, defendants' motivations were racial. Defendants were concerned that hiring plaintiffs would undermine the goal of diversity in the Fire Department; would fail to develop managerial role models for aspiring firefighters; and would subject the City to public criticism. Each of these concerns is directly related to most of the plaintiffs' race, and thus constitute racial considerations that would support a finding of intentional race discrimination." (quotations omitted)); Brief for the Pacific Legal Foundation et al. as *Amicus Curiae* Supporting Petitioner, *Ricci*, at 15 ("Such a blatantly race-conscious decision, made to lower the likelihood of a potential disparate impact claim, constitutes the precise type of discrimination that Title VII was designed to prohibit."); Brief for the Cato *(cont'd)*

decision, they argue, amounts to intentional discrimination. *Id.*

In fact, rather than practicing intentional discrimination, Respondents were actually complying with their affirmative obligation to *avoid* racial discrimination. *See Johnson v. Transp. Agency*, 480 U.S. 616, 630 (1987). Government actors are encouraged to devise measures to address racial discrimination in a general way without engaging in race-based treatment of individuals. *See Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (Kennedy, J., concurring in part and concurring in the judgment); *see also Grutter v. Bollinger*, 539 U.S. 306, 334 (2003) (affirming the "plus" treatment of diversity in the

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(cont'd from previous page)
Institute as *Amicus Curiae* Supporting Petitioner, *Ricci*, at 12 ("Similarly, the more employers heed the incentive to throw out test results based merely on race-based statistical disparity, the more unintentional discrimination will be replaced by intentional discrimination."); Brief for the United States as *Amicus Curiae* Supporting Petitioner, *Ricci*, at 32 ("The [district] court did not, however, adequately consider whether, . . . respondents' claimed concern about Title VII liability was a pretext for intentional racial discrimination."); Brief for the Claremont Institute as *Amicus Curiae* Supporting Petitioner, *Ricci*, at 12 ("[T]he use of race to determine government promotions on a preferential basis (or deny them to others) is not remedial, but rank racial discrimination."); Brief for the Mountain States Legal Foundation as *Amicus Curiae* Supporting Petitioner, *Ricci*, at 3 ("The decision to void the test and make no promotions is blatant race-based decision making, which is designed to achieve racial balance in the fire department.").

admissions process for post-graduate education as a flexible and non-mechanical way of treating race).

Here, Respondents decided to not certify the test results for *anyone*, regardless of their race. An across-the-board non-certification does not amount to race-conscious decision-making, and certainly not race-based decision-making. *See id.* And, in any event, Title VII does not mandate that Respondents "act in a wholly 'color blind' fashion."[44] The Court has held that voluntarily adopted race-conscious remedies for past discrimination are justified by public agencies under Title VII by a showing only of the existence of a "manifest imbalance" of minorities or women in "traditionally segregated job categories." [45] To determine whether such an imbalance has occurred, the Court may compare the percentage of minorities or women in the employer's work force with the percentage in the area labor market or general population. [46] Contrary to Petitioners' argument, the statutory standard under Title VII does not require evidence of past

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[44] *Fullilove v. Klutznick*, 448 U.S. 448, 482 (1980); *see also Adarand*, 515 U.S. at 200.

[45] *Johnson v. Transp. Agency*, 480 U.S. at 631 (quoting *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 197 (1979)).

[46] *Id.* at 637. In the case of Asian Americans, there is generally a gross disparity between the percentage of Asian Americans in the firefighting forces and the percentage of Asian Americans in the general population. *See* Part I.A., *supra*. It is this type of disparity, rooted in a historical legacy of discrimination, that government actors should be encouraged to remedy through compliance with Title VII.

discrimination by a specific employer to justify that employer's voluntarily adopted practices to comply with Title VII.[47]

Petitioners' position binds the hands of cities trying to voluntarily comply with the letter and spirit of Title VII.[48] There are several reasons why employers should be encouraged to take action before a Title VII violation. In addition to judicial economy and the cost savings from obviated litigation, voluntary action may produce more favorable results because it is less likely than a court order to engender opposition and resentment. *Kirkland v. N.Y. State Dep't of Corr. Servs.*, 711 F.2d at 1128 n.14. Further, "the value of voluntary compliance is doubly important when it is a public employer that acts, both because of the example its voluntary assumption of responsibility sets and

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[47] *See id.* at 631; *see also Hayden v. County of Nassay*, 180 F.3d 42, 51 (2d Cir. 1999) ("[E]ven in the absence of specific and identified discrimination, nothing in our jurisprudence precludes the use of race-neutral means to improve racial and gender representation." (citing *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989)).

[48] There is an affirmative obligation to comply with Title VII, as voluntary compliance is a preferred means of achieving Title VII's goal of eliminating employment discrimination. *See Johnson v. Transp. Agency*, 480 U.S. at 630; *see also Officers for Justice v. Civil Serv. Comm'n of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982); *Kirkland v. N.Y. State Dep't of Corr. Servs.*, 711 F.2d 1117, 1128 (2d Cir. 1983) ("[V]oluntary compromises of Title VII actions enjoy a presumption of validity."), *cert. denied sub nom. Althiser v. N.Y. State Dep't of Corr. Servs.*, 465 U.S. 1005 (1984).

because the remediation of governmental discrimination is of unique importance." *Wygant*, 476 U.S. at 290 (O'Connor, J., concurring).

Respondents' actions were grounded in the jurisprudence of the Court and the principles behind Title VII. Efforts to comply with EEOC Guidelines and Title VII standards should be encouraged, not used as a basis for legal liability. It is critical to the function of Title VII that the Court not constrain the hands of government actors to ensure that all people have equal opportunity regardless of their race.

This is all the more important because structural racial disparities, rooted in a historical legacy of discrimination, continue to persist. The stereotypes that Asian Americans are perpetual foreigners or a model minority are key workplace issues for the Asian American community. *See* Part I.B. and C. Studies have demonstrated that a glass ceiling prevents Asian Americans from progressing as quickly as their non-Hispanic white colleagues progress. *See* Part I.C. In order to ensure that Asian Americans, and other racial minorities, have an equal opportunity in the workplace, cities should be free to address workplace discrimination before a Title VII violation occurs. Any attempts to limit the reach of Title VII should be prevented.

CONCLUSION

For the foregoing reasons, as well as those outlined by Respondents, *Amici* respectfully requests that the Court affirm the judgment of the Second Circuit.

Date: March 25, 2009

Respectfully submitted,

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APPENDIX

APPENDIX

List of Amici Curiae

Asian Law Alliance (ALA)
ALA, founded in 1977, is a nonprofit public interest legal organization with the mission of providing equal access to the justice system to the Asian and Pacific Islander communities in Santa Clara County, California. In the area of fair employment practices, ALA has advocated for affirmative action programs for Asian and Pacific Islanders.

Asian American Institute (AAI)
AAI is a pan-Asian, non-partisan, not for profit organization located in Chicago, Illinois, whose mission is to empower the Asian American community through advocacy, by utilizing coalition building, education, and research. AAI's programs include community organizing, leadership development, and legal advocacy. Asian Americans are a diverse and often overlooked community, but they are one of the fastest-growing populations in the United States. Because AAI recognizes the importance of including Asian Americans in public sector jobs, and the importance of using fair and legal methodologies to advance public sector employees, AAI has a strong interest in the outcome of this case.

Asian Law Caucus (ALC)
The ALC is a nonprofit, public interest legal organization whose mission is to promote, advance, and represent the civil rights of Asian Pacific

Islander communities. Founded in 1972, the ALC is the nation's oldest Asian Pacific Islander civil rights legal organization. The ALC has provided legal services and community education on discrimination, represented individuals in discrimination suits, and conducted local and regional policy advocacy on the importance of diversity programs. The ALC has an interest in this case because governments should have the right to not certify employment tests results that have a disparate impact on a protected class. The ALC is affiliated with AAJC.

Boat People SOS (BPSOS)

BPSOS is a national immigrant services organization serving primarily Vietnamese refugees and immigrants with thirteen branch offices nationwide. BPSOS' domestic operation includes a large array of human and immigration services for Vietnamese refugees and immigrants. Harboring a strong mistrust of governmental agencies and personnel due to political persecution in Vietnam, this population does not access services often. When they do, they are often discouraged by the lack of culturally and linguistically competent service providers. It is important that all ethnicities are represented in government especially in the area of first responders to provide this competency. It is because of this interest BPSOS participates in the brief.

The Japanese American Citizens League (JACL)

JACL, founded in 1929, is the nation's oldest and largest Asian American non-profit, non-partisan civil

rights organization with 113 chapters throughout the continental United States, Hawai'i, and Japan. The mission of the JACL is to uphold the civil and human rights of Americans of Japanese Ancestry and of all people. The JACL played a prominent role in obtaining redress for Japanese Americans who were interned during World War II. The JACL has also worked to educate against and combat discrimination on the basis of race, national origin, age, ethnicity, gender, or disability, and to protect the right of all persons to equal participation in the political process.

The Fred T. Korematsu Center for Law and Equality (Korematsu Center)

Korematsu Center is a nonprofit organization based at Seattle University School of Law and works to advance justice through research, advocacy, and education. The Korematsu Center is dedicated to advancing the legacy of Fred Korematsu, who defied the military orders during World War II that ultimately led to the internment of 110,000 Japanese Americans. He took his challenge of the military orders to the United States Supreme Court, which upheld his conviction in 1944 on the ground that the removal of Japanese Americans was justified by "military necessity." Fred Korematsu went on to successfully challenge his conviction and to champion the cause of civil liberties and civil rights for all people. The Korematsu Center, inspired by his example, works to advance his legacy by promoting social justice for all. It has a special interest in safeguarding access to opportunities for all groups in all walks of life. We note that the Korematsu Center does not, in this brief or

otherwise, represent the official views of Seattle University.

The Minority Business Round Table (MBRT)
MBRT is a national nonprofit 501(c)(3) membership organization for chief executive officers ("CEOs") of the nation's largest and leading minority-owned Asian American, African American, Hispanic American, Native American and Women owned companies. It functions as the vehicle for its members to analyze and help formulate effective public policies that impact these minority-owned businesses. Members hold positions equivalent to CEO or chairperson in their respective businesses. MBRT supports the Asian American community as an amicus/friend to ensure equal opportunity and access and inclusion for minorities and women. This is an important national priority and policy of the United States of America, its States, and its local governments that must be preserved and maintained.

The National Council of Asian-American Business Associations (NCAABA)
NCAABA is a 501(c)-3 organization that serves as the national voice for the Asian American business community. We support the AAJC brief because we believe Asian Americans are disproportionately underrepresented in service areas such as firefighting and other positions, in part due to a history of exclusion from public sector positions, and we sincerely believe that Asian Americans benefit when local governments utilize promotion and advancement methodologies that do not have a disparate impact on minorities. Therefore, we are

supportive of AAJC's initiatives that address these disparities.

Organization of Chinese Americans, Inc. (OCA)
OCA is a 501(c)(3) national nonprofit, nonpartisan organization dedicated to advancing the social, political, and economic well-being of Asian Pacific Americans in the United States. With over 80 chapters and affiliates across the nation, OCA's aims are to advocate for social justice, to promote civic participation, to advance coalitions and community building, and to foster cultural heritage. OCA monitors issues and policies that affect the Asian Pacific American community. Accordingly, OCA supports AAJC's positions in the current case and has a strong vested interest in its outcome as Asian Pacific Americans have faced a long history of employment discrimination. In the current case, the decisions of the District Court and Court of Appeals would affect not only the program at issue and other similar programs at fire departments throughout the Second Circuit, but also similar programs across the United States. The potentially very broad impact of this case provides Amici a substantial interest in its outcome.

The Sikh American Legal Defense and Education Fund (SALDEF)
SALDEF is the oldest Sikh American civil rights and advocacy organization in the United States. Founded as the Sikh Mediawatch and Resource Task Force (SMART) in 1996, SALDEF empowers Sikh Americans through legal assistance, educational outreach, legislative advocacy, and media relations. SALDEF has over a decade of experience in working

with other Sikh and minority organizations in providing public policy, advocacy, and community education on discrimination issues. SALDEF has a strong interest in this case as Asian Americans, like all Americans, must not be treated unequally by employers because of their race. As such, we support AAJC's position that it is reasonable for government actors to decline certification of test results that have a disparate impact on any minority group in order to achieve employment equality for all. This case raises crucial questions concerning the freedom of government actors to voluntarily comply with Title VII's prohibition against using employment tests that have a disparate impact on a protected class. Such compliance avoids unlawful discrimination and helps to prevent litigation from the protected class. Forcing a government actor to use a test that potentially runs afoul of federal employment guidelines is clearly contrary to the very purpose for which Title VII was conceived: freedom from discrimination.

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Supreme Court, U.S.
FILED
FEB 25 2009
OFFICE OF THE CLERK

Nos. 07-1428, 08-328

In the

Supreme Court of the United States

FRANK RICCI, ET AL.,
Petitioners,

v.

JOHN DESTEFANO, ET AL.,
Respondents.

FRANK RICCI, ET AL.,
Petitioners,

v.

JOHN DESTEFANO, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF KEDAR BHATIA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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Questions Presented

(1) When a content-valid civil-service examination and race-neutral selection process yield unintended racially disproportionate results, do a municipality and its officials racially discriminate in violation of the Equal Protection Clause or Title VII when they reject the results and the successful candidates to achieve racial proportionality in candidates selected?

(2) Does an employer violate 42 U.S.C §2000e-2(*l*), which makes it unlawful for employers "to adjust the scores of, or use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race," when it rejects the results of such test because of the race of the successful candidates?

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Interest of Amicus Curiae[1]

Amici is a college student. The role of the Federal judiciary has in shaping every life can hardly be overstated. The views presented in this brief represent the result of hours of debate and dialogue that occurred in the most unusual of circumstances but with the humble goal of shining light on just one portion of the competing interests of precedent, policy, and principle that makes this case both as fascinating and as difficult as any this Court has seen in years.

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission. Parties have provided written consent, on file with the Court, to the filing of *Amicus* briefs in support of either, or neither party.

Summary of Argument

The most plain reading of the text, history, and purpose of the Equal Protection Clause of the Fourteenth Amendment requires this Court to begin from the proposition that the government may not stratify citizens into classes based on their race.

This Court has held that in rare circumstances government entities may employ racial classifications if they pass a test of strict scrutiny. The District Court erred in not applying strict scrutiny to the decision of the Civil Service Board. This Court has held repeatedly, most recently only two terms ago, that any government decisions involving race should be subject to the most thorough and critical scrutiny available. Because the city openly acknowledged that it based its decision on the race of the individuals who passed the test in question, there can be little doubt that their refusal to certify the results of the test in question was based on, whether justified or not, a racial classification.

Once strict scrutiny is applied, the Court must consider whether a compelling state interest exists. The city first failed to argue a compelling interest with its multi-factor analysis attacking several problems with the test. None of the concerns equate to a valid compelling interest. Attempted compliance with the Equal Protection Clause is not the same as actual compliance and this Court has never held otherwise.

The second part of the strict scrutiny test requires the city to prove that its remedy is narrowly tailored to meet its stated objective. *Ad hoc* rejection of an otherwise valid test does not represent the type

of carefully constructed race-sensitive remedy that this Court has upheld in the past.

Finally, this Court is asked to compare the mechanisms of the city's decision to some of the rigid quota systems that this Court has held unconstitutional in the past. The city considered only the racial distribution of passing firefighters, and after it stated a desire for diversity, it considered only one type of diversity and made that the first criterion necessary to obtain valid test results. Had a higher number of minority students passed the exam, the results would have been certified and applicants of both races would be eligible for promotion. A rigid, number-based system like the one the city implicitly furthered fails the test of strict scrutiny for the same reasons other quota systems have failed.

Argument

I. THIS COURT'S JURISPRUDENCE REQUIRES THAT ANY RACIAL CLASSIFICATION BE JUSTIFIED UNDER STRICT SCRUTINY

A. The city's race-based decision qualifies it for review under strict scrutiny

This Court has consistently and unequivocally held that governmental decisions based on racial and ethnic classifications should be subject to the most rigid scrutiny. Every reason respondents have given for their refusal to certify the test results in question has been based on the race of the individuals who

would have been eligible to receive promotion. Whether the City had hoped to have a more diverse workforce, as role models for younger firefighters, or whether they were concerned about the political consequences of promoting only white firefighters, the City has made a decision premised solely on the race of the individuals in question and must therefore face "the most exacting judicial examination." *Regents of the University of California v. Bakke*, 438 U.S. 265, 291 (1978); *See, e.g., Korematsu v. United States*, 323 U.S. 214, 216 (1944); *Loving v. Virginia*, 388 U.S. 1, 11 (1976); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 224 (1993); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Grutter v. Bollinger, et al.*, 539 U.S. 306 (2003); *Johnson v. California*, 543 U.S. 499, 505-506 (2005); *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. ___ (2007).

Judge Arterton rejected this Court's precedent when she refused to apply strict scrutiny to the case at hand and the Second Circuit affirmed her reasoning and conclusion. Judge Arterton argues that the "result was the same for all because the test results were discarded and nobody was promoted." *Ricci v. DeStefano*, 554 F.Supp.2d 142, at 161. While that very well may be true, the method used in reaching that conclusion was racially-motivated and qualifies for elevated scrutiny. Judge Arterton rejected the presence of a racial classification because the same test was taken by all applicants and no applicants were promoted to the positions they sought. See, *e.g., Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 349 (1938) ("The question here is not of a duty of the State to supply legal

training ... but of its duty when it provides such training to furnish it to the residents of the State upon the basis of an equality of right").

Judge Arterton's reasoning is not persuasive because state action premised on an unconstitutional racial classification is not defined solely by its impact, but instead by both the method in which it is crafted and the impact it has on individuals. She concedes that administration of the law is as important as its impact and goes on to claim that "the constitutional injury plaintiffs claim here is not failure to be promoted, but failure to be treated equally on the basis of race." Ibid. Judge Arterton acknowledged that for the purposes of petitioner's Title VII claim that "the City's reasons for advocating non-certification were related to the racial distribution of the results," *Ricci, supra,* at 153, but denies the presence of the same "reasons for advocating non-certification" for the purposes of petitioners' equal protection claim. Judge Arterton's Title VII analysis was certainly right to claim that a racial decision had been made as this Court has repeatedly held that state action "against whites and in favor of certain minorities ... constitutes a classification based on race." *Wygant v. Jackson*, 476 U.S. 267, 274 (1986) (plurality opinion of POWELL, J.).

The fact that both races were treated equally by the City still requires the application of strict scrutiny. In *Shaw v. Reno*, 509 U.S. 630 (1993), the North Carolina state legislature drew one predominantly black district and this Court affirmed that "racial classifications receive close scrutiny even when they may be said to burden or benefit the races

equally." *Id.* at 651. *See e.g., Powers v. Ohio,* 499 U.S. 400, 410 (1991):

> The suggestion that racial classifications may survive when visited upon all persons is no more authoritative today than the case which advanced the theorem, *Plessy v. Ferguson,* 163 U.S. 537 (1896). This idea has no place in our modern equal protection jurisprudence. It is axiomatic that racial classifications do not become legitimate on the assumption that all persons suffer them in equal degree. *Loving v. Virginia,* 388 U.S. 1 (1967).

In *Village of Arlington Heights v. Metropolitan Housing Development Corporation,* 429 U.S. 252 (1977), this Court further affirmed that even facially race-neutral behavior falls under the scope of action that requires strict scrutiny when it is "unexplainable on grounds other than race ... even when the governing legislation appears neutral on its face." *Id.* at 266. In those cases, "[t]he evidentiary inquiry is then relatively easy." *Ibid.* In the case of the New Haven CSB, there can be little doubt that race played a major factor in the decision-making process.

In *Turner v. Fouche,* 396 U.S. 346 (1970), this court was asked to rule on a Georgia statute that specified the method of selection to grand juries and school boards. This Court found that even though the statute was not "not inherently unfair, or necessarily incapable of administration without regard to race," federal courts were not required to sit idly if "they

have been unconstitutionally applied." *Id.* at 355, 356.

This Court has ruled consistently across its equal protection jurisprudence that in fields as varied as redistricting, allocation of zoning permits, and jury selection, government action administered in a way that varies based on race requires the application of the most rigorous scrutiny, regardless of whether or not it is facially neutral.

B. The city's rationale for imposing a racial classification does not meet this Court's standard for a Compelling State Interest

In order for a state-sanctioned racial classification to pass strict scrutiny, it must be "narrowly tailored" to fulfill a "compelling [government] interest." *Johnson, supra,* at 505 (quoting *Adarand*). Of first consideration is the alleged compelling interest because, without it, the tailoring of the proposed remedy is moot.

The Court has frequently upheld two compelling state interests sufficient to warrant the dangerous use of racial classifications. The first is to remedy the effects of past discrimination. However, this widely-used justification does not give governments *carte blanch* to manipulate racial classifications at will. *See City of Richmond v. J. A. Croson*, 488 U.S. 469, 499 (1989) ("[A]n amorphous claim that there has been past discrimination in a particular industry cannot justify the use of an unyielding racial quota.").

The second commonly accepted interest justifying racial classifications is the desirability of

diversity in higher education. This Court has affirmed several times that "universities occupy a special niche in our constitutional tradition" because of their "purpose of public education", "the expansive freedoms of speech and thought associated with the university environment," and their ownership of "educational autonomy." *Grutter, supra*, at 329. It follows that arguments that may justify the use of racial classification for institutions of higher education may not be sufficient to justify their use by other parts of the government. The city does not claim to fall under the scope of a center of higher learning.

The City of New Haven failed to support a single "compelling interest" for their use of race-based policy decisions. Testimony from the hearings on certification point to, among other things, (1) the desire to avoid imposing an adverse impact on minority applicants and (2) a good-faith desire to avoid Title VII violation. The city's multi-factor analysis is hardly compelling as both stated interests do not equal the sum of one sufficient interest. The purpose of the 'compelling interest' prong of the strict scrutiny is to ensure that government entities pursue ends that justify the difficult use of race-based decisions in public policy. If the CSB could meet its equal protection requirements by declaring a good-faith attempt at adherence, the Equal Protection Clause would be rendered toothless to stop unlawful and inappropriate discrimination. The government should always be held to a standard that exceeds good-faith attempts at compliance, but even moreso when it involves policy involves opaque government-sanctioned race classifications.

The city argues that because it thought it was adhering to the law, the Court should take it at its word. The District Court picked up on the argument when it noted that "[the city] argue[s] that they had a good faith belief that Title VII mandated non-certification, and they cannot be liable under Title VII for attempting to comply with that very statute." *Ricci, supra,* at 151. Whatever its broader implications may be, this Court has never accepted attempted legislative compliance as a valid "compelling interest" for the purposes of passing strict scrutiny. It is precisely because racial-classifications constitute such a serious use of state authority that this Court must not take the CSB's assurances at face-value without further investigation. *See Weinberger v. Wiesenfeld,* 420 U.S. 636, 648 (1975) ("[T]he mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme."); *J. A. Croson,* supra, at 501-502; *McLaughlin v. Florida,* 379 U.S. 184, 190-191 (1964) ("Normally, the widest discretion is allowed the legislative judgment ... [b]ut we deal here with a classification based upon the race of the participants"); *Korematsu, supra,* at 235-240 (opinion of MURPHY, J., dissenting).

Many argue that this construction of the equal protection clause invariably tightens a noose around any local governments that employ race-based determinations. The test is fair, but correctly balanced and intentionally difficult. It is by no means "strict in theory, but fatal in fact." *Fullilove v. Klutznick,* 448 U.S. 448, 519 (1980) (opinion of Justice MARSHALL, concurring). This Court has

repeatedly found instances where cities have worked diligently, effectively, and within constitutionally-proscribed limits to craft valid policies that consider race. *See e.g., Local 28 Sheet Metal Workers v. EEOC*, 478 U.S. 421 (1986); *United States v. Paradise*, 480 U.S. 149 (1987); Speculative concerns, however, are simply insufficient to justify the presumptively invalid use of race by an entity of the government.

The CSB justifies its decision with a series of secondary rationales that do not pass strict scrutiny individually and do not pass when taken as a whole. The city's desire to avoid certifying a test with an adverse impact on African-American firefighters may have constituted a legitimate concern, but only if they had taken steps to verify that the test might actually present an unlawful adverse impact. The city refused to conduct a validation study in order to fully consider the issue and without one, they have no reason to reject the test on the grounds of its adverse impact.

The city contacted several experts to analyze the tests but the experts could only postulate inconclusively about the cause, reasoning, and legal implications of the test in question.

Some firefighters argued that the test questions covered knowledge required in their desired positions (including defendant Frank Ricci himself) while others suggested that the test asked questions unrelated to anything they would encounter in the real world. One of the experts contacted by the CSB, Fire Program Specialist Vincent Lewis, believed the tests were appropriately based on necessary knowledge after looking at the tests. Upon the question of job-relatedness, the city

chose not to conduct a thorough validation-study to compare the test to the EEOC's "Uniform Guidelines of Employee Selection Procedure." *Ricci*, *supra*, at 146.

Opinion was also split on the question of why so many more non-minority applicants passed than minority applicants. The CSB first heard from Dr. Christopher Hornick who, after conceding that he had not "had time to study the test at length or in detail," told the board, "I'm not sure I can explain it." Regardless, he went on to hypothesize that the weight assigned to the various parts of the test may have been the cause of the disparity.

The final expert to appear before the CSB, Dr. Janet Helms, spoke about the general correlation between race and test performance but had not examined the specific tests in question. *Id.* at 150. Dr. Helms spoke of the different impact that certain testing methods generally have on minority and non-minority applicants including, but not limited to, "speak accented speech," different job-related strategies, and differing levels of on-the-job mentoring. *Ibid.*

Upon seeing the results of the test, the CSB did what it could only be expected to do: it held hearings to investigate the implications of the test results. Based on the record, the findings of its hearings were murky and inconclusive, certainly not the kind of results that would require, or even merit, the use of a race-sensitive remedy.

The CSB contend that the promotions recommended by examination would "undermine their goal of diversity ... and would fail to develop managerial role models for aspiring firefighters." *Id.*

at 163. As mentioned above, the goal of achieving racial diversity itself is not justification sufficient to create racial-classifications without regards to other types of diversity.[2]

The desire to create role models for minorities was explicitly discredited by this Court as a valid compelling interest in *Wygant* and now represents exactly the type of "generalized assertion" that provides insufficient guidance "for a legislative body to determine the precise scope of injury it seeks to remedy" and "has no logical stopping point." *Id. at J. A. Croson*, 498 (internal quotations omitted). quoting *Wygant, supra*, at 275-276.

The Court has rejected all of the CSB's claims in past cases. The fact that they offer several different rationales for their decision does not lend credence to their argument as a whole.

C. The city's plan is not narrowly tailored to meet its stated interest

The two prongs of strict scrutiny are closely related and, as such, policies must feature "the most exact connection between justification and classification." *Fullilove, supra*, at 537.

The City of New Haven considered only the numerical distribution of the test before concluding that it was an inappropriate examination. Its reliance on sheer numbers represents an unlawfully

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[2] *See Grutter, supra*, 316 ("The policy does not restrict the types of diversity contributions eligible for substantial weight in the admissions process, but instead recognizes many possible bases for diversity admissions.) (internal quotations omitted).

broad method for achieving racial balance. *Id. at J. A. Croson*, 507 (opinion for the majority) ("[T]he 30% quota cannot be said to be narrowly tailored to any goal, except perhaps outright racial balancing").

This Court has previously upheld narrowly drawn number-based racial stratifications as an appropriate remedy for past discrimination. Most notably, in *Sheet Metal Workers, supra*, this Court concluded that, after nearly a decade of extensive mediation between unions, the EEOC and local government, a District Court was justified in imposing a membership goal of 29.23 percent. In fact, six members of that Court felt that the District Court had properly applied a nonwhite membership goal based on extensive research and consideration of employment factors such as the racial composition of the relevant labor market. *Id.* at 478 U.S. 482.

In *J. A. Croson*, this Court refused to accept that discrimination could be proven by looking at numbers alone. The Court held that "for certain entry level positions ... statistical comparisons of the racial composition of an employer's workforce to the racial composition of the relevant population may be probative of a pattern of discrimination." However, "where special qualifications are necessary," only the comparisons to the relevant qualified applicant pool can serve to prove patterns of discrimination. *J. A. Croson, supra*, at 501. *See also Teamsters v. United States*, 431 U.S. 324 (1977); *Hazelwood School District v. United States*, 433 U.S. 299 (1977).

Determining the relevantly qualified applicant pool is a difficult task, as the Court found in *J. A. Croson*. If the promotion rates suggested by the test taken by respondents accurately represents the

proportion of qualified applicants in the pool, the city would have difficulty proving that rejecting the test at hand would be the most narrowly tailored method of increasing the number of qualified applicants.

The CSB's rejection of test results does not "narrowly tailor" a remedy to fix the low minority promotion rate that the test allegedly creates. The CSB does nothing to increase the number of minority firefighters and instead, blocks all firefighters who took this particular test. This defense contradicts the argument made by the city that its decision was made to rectify past episodes of discrimination.

The decision of the District Court in *Sheet Metal Workers* came after extensive research and planning in order to provide a narrow but effective remedy to past malicious discrimination and repeated "bad-faith attempts to prevent or delay affirmative action." 478 U.S., at 431. It was clear to the Court that the behavior of the employers at hand warranted the use of a race-based employment goal and that nothing short would satisfy the government's interest in reversing past discrimination by the union in question. In the case of the Local 28 Union, episodes of egregious past discrimination were being neutralized by a well-researched and purposefully designed recruitment scheme. *See e.g., Paradise, supra*, at 185 ("The one-for-one requirement is the product of the considered judgment of the District Court which, with its knowledge of the parties and their resources, properly determined that strong measures were required in light of the Department's long and shameful record of delay and resistance.") (Opinion of BRENNAN, J.).

Unlike the District Court in *Sheet Workers*, the Civil Service Board took none of the same exhaustive steps to carefully tailor and administer its 'remedy'. The CSB opted out of conducting a validation study to determine the job-relatedness of the test itself. If the test had been found to be job-related, the use of race may not have been a factor and the city may have been able to certify the tests. Instead, it took the conflicting testimony of experts to mean that they had reason to believe that the test might have problems and they they would probably be justified in refusing to certify the test.

The CSB's *ad hoc* decision simply does not translate to a valid method of attaining *any* valid compelling interest in racial disparity. In *Parents Involved*, Justice Kennedy noted that apparent inconsistencies in the applications of the Jefferson County's guidelines resulted in a "far-reaching, inconsistent, and *ad hoc*" approach to creating diversity. *Parents Involved, supra,* slip. op. at 5 (opinion of KENNEDY, J., concurring in part and concurring in the judgment). The decision of the CSB to reject the results of the examination in question is justified by an even more opaque rationale revolving around arguable conclusions based on uncertain assumptions about the past history of discrimination and the impact of the test on current applicants.

Strict scrutiny asks difficult questions of the CSB and for good reason. Racial-classifications must be used only as a method of last resort and only in the most narrow circumstances. Here, the CSB made the decision to use racial-classifications after conflicting evidence and testimony suggested that it might be within the law to do so. In all of the cases

where race-based classifications were deemed to be a valid interest, cities and local governments were in involved comprehensive and patient analysis of past-discriminatory practices. The CSB did no such in-depth review and has not shown that it considered all of its options before reaching the conclusion that it could strike down the results of the examination.

II. THE DECISION MADE BY THE CITY OF NEW HAVEN MIRRORS QUOTA SYSTEMS THAT HAVE BEEN HELD UNCONSTITUTIONAL BY THIS COURT

This Court's precedent has long held that race-based quota systems, and even quota-like systems, are unconstitutional applications of racial classes. Most recently, in *Grutter*, the majority defined a quota as, among other things, having "a fixed number or percentage which must be attained, or which cannot be exceeded" *Grutter, supra*, at 335, quoting *Sheet Metal Workers, supra*, at 495 (opinion of O'CONNOR, J., concurring in part and dissenting in part). In New Haven, if a certain number of minority firefighters had passed, the city would have certified the results of the test and, if not, the city would refuse to certify the test.

The system at play in New Haven does not consider "race as one factor among many." *Grutter, supra*, at 340. The City of New Haven saw the results of the test and determined that the results could not be certified solely on the basis of the race of the applicants who would have been eligible for promotion. In comparison to the use of affirmative action in higher education, the city's use of arbitrary

racial quotas represents a bizarre twist on the use of race-based hiring practices. In higher education affirmative action practices, individuals are competing for admittance to universities based on several factors at their control, including grade point average, standardized test scores, and extracurricular activities, of which race is often considered a tie-breaker between similarly qualified students.

Petitioners, however, had only one criteria to meet before becoming qualified for promotion - the results of a test measuring their knowledge and familiarity with the aspects of the job they hoped to perform. They passed this test yet the results were rejected across the board because an insufficient number of minority applicants had the skills or knowledge required to pass what has been universally acknowledged to be an appropriate measurement of the necessary requirements for promotion. The city did not pursue a legitimate affirmative action procedure - considering race along with performance on this exam - they simply rejected the exam based on a statistical review of the results of the otherwise legitimate exam.

In this Court's most recent precedent on the matter, *Parents Involved v. Seattle School District No. 1*, the Court held that simply looking at the number of students who fall into a particular racial category cannot justify the use of racial classifications. The opinion in *Parents Involved* quoted from the *Grutter* decision at length and sought to reaffirm the "entire gist of the analysis in *Grutter* was that [the university] focused on each applicant as an individual, and not simply as a

member of a particular racial group." *Parents Involved, supra,* slip op. at 14.

III. THE REASONABLE APPROACH TO INTERPRETING THE EQUAL PROTECTION CLAUSE SHOWS THAT IT MUST GIVE COLOR-BLIND PROTECTION

The most plain reading of the text and purpose of the Equal Protection Clause of the Fourteenth Amendment requires this Court to begin from the proposition that the government may not stratify citizens into classes based on their race.

A. The only sustainable long-term interpretation of the clause is a color-blind one, as evidenced by its development in nations like India

This court has wrestled for decades to patrol the zone between permissible policy decisions centered on race and impermissible decisions denying certain classes of citizens the equal protection of the law. *See, e.g., Missouri ex rel. Gains v. Canada, supra*; *Sweatt v. Painter,* 339 U.S. 629 (1950); *Lee v. Washington,* 390 U.S. 333, 334 (1968). Throughout the world, Courts have faced similar problems and interpreted similar statutes in a variety of ways that shed light on the future of America's own approach.

For example, India has struggled with state-sanctioned "positive discrimination" since the founding of its Constitution in 1947. Thomas Sowell, *Affirmative Action Around the World,* 2004. Those protections, designed to be temporary and

conciliatory in nature, have been extended well-beyond their originally proposed time frame and have fueled the type of racial animosity they were designed to extinguish. Id. at 21.[3]

The Indian model of equal protection draws heavily from the American model that had already been used extensively when it was incorporated into Article XIV of the Indian Constitution.[4] After decades tailoring and adjusting the limits of equal protection jurisdiction, in 1993 the Supreme Court of India mandated the creation of a "creamy layer" exception to the positive discrimination granted to Other Backwards Classes, the most poor and disadvantaged classes in the country. That Court held that states should design procedures to remove from racial benefits the "creamy layer" of individuals who are advanced enough to no longer warrant the benefit of discrimination in their favor. Politicians around the country stalled, and the Court was forced to deal extensively with the lack of political will to curtail the use of caste-based discrimination. P.P. Vijayan, *Reservation Policy and Judicial Activism,* 2006, at 78.

Commissions later strove to curtail the use of racial preferences in public policy and produced mixed results. What is clear, however, is that the policies that were originally intended to be temporary quickly evolved into broad, seemingly

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[3] For information on the initial timeline proposed, see S.S. Jaswal, *Reservation Policy and the Law* (2000), at 63.

[4] Article XIV of the Indian Constitution reads: "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."

permanent policies. These policies then could never be explicitly phased out or narrowed to meet the required constitutional limitations. *Id.* at 81-84.

In furtherance of a similar goal, this Court has maintained that racial classifications designed to help one race at the expense of other races "must have a logical end point." *Grutter*, *supra*, at 342. This Court should define the end point.

If we are to learn from the experiences of other nations, it would be evident that state-sanctioned racial stratifications will not simply evaporate on their own accord. Our nation has undoubtably made substantive strides toward fixing the racial conflict that sparked a civil war and fueled another century of tension and conflict. The historic election of our nation's first black President shows how far we have come in the struggle to eliminate *de jure* discrimination and to recitify *de facto* barriers to equal protection. Justice O'Connor's prediction that racial classifications would no longer be a valid compelling interest 25-years after *Grutter* will likely ring true. If anything, recent events suggest that our nation has moved towards that point much faster than anyone could have predicted even 5 years ago.

B. This is a model case for further sharpening the Court's Equal Protection jurisprudence

It is difficult to see any firefighters benefiting from the decision of the CSB. No more minority firefighters have been promoted than would have otherwise been promoted if the test results had been certified. Non-minority firefighters who legitimately studied for and passed their exam have been denied

the chance to be considered for promotion and the pay increases that would accompany that promotion. The decision of the CSB was so broad as to unduly injure innocent parties but also provided no direct, or even indirect, benefit to the parties it alleges to aid. *See, e.g., McLaughlin, supra,* at 190 ("The courts must reach and determine the question whether the classifications drawn in a statute are reasonable in light of its purpose").

The idea that policies should evolve with the changing standards of society is nothing new to this Court. *Grutter, supra,* at 342. ("[R]ace-conscious admissions policies must be limited in time. This requirement reflects that racial classifications, however compelling their goals, are potentially so dangerous that they may be employed no more broadly than the interest demands.") Reaffirming the principle that racial classifications are valid only as long as their "interest demands" would not require this Court to expand or narrow its precedent. It would only require this Court to enforce the well-accepted and reasoned principle that racial classifications are useful, but ultimately temporary measures.

Concluding that racial classifications are less necessary than before does not rely upon first accepting the premise that we live in a post-racial world. Whatever the merits of that argument, this Court is only asked about limits of government action. The government alone cannot completely solve the problem of racial conflict in this country, nor does the Constitution allow it.

The questions presented in this case cut straight to the heart of equal protection guarantees around

the country. The Civil Service Board made an *ad hoc* promotion decision that disadvantaged a group of firefighters because too many of them were of the same race. This Court has the opportunity now to provide guidance to local and state government officials about the proper application of racial classifications when making promotion decisions. A role for narrow racial classifications may exist within the scope of the equal protection clause, and this case marks an important opportunity for this Court to clarify its precedents.

Conclusion

The CSB's overwhelming rationale for rejecting the test was the sheer number of non-minority firefighters who would have been eligible for promotion if the results of the test were certified. Other reasons not to certify - the scope of the test, its administration, or the way in which it was weighted - do not provide a valid compelling interest for the city to act on. Several potentially valid interests cannot be summed to equal even a single valid compelling interest for the city's use of race in making an *ad hoc* promotion decision.

The government's use of race in decision-making should always be a method of last resort and made only in the most pressing circumstances. The facts of the case as presented in the record suggest that the Civil Service Board did not exhaust all of their investigative tools when deciding to make an extreme decision to block several firefighters from promotion opportunities because too many of them had a certain skin color.

Affirmative action programs have always been designed for only temporary use in solving the most egregious, immediate disadvantages that minorities face. These programs must be both specific and narrow, and are properly reserved for only the most compelling government interests. It is difficult to see any firefighters benefiting from the decision of the CSB. No more minority firefighters have been promoted than would have otherwise been eligible for promotion if the test had been certified. Reaffirming the principle that racial classifications are valid only as long as long as the state's interest is compelling would not require this Court to expand or narrow its precedent. It would only require this Court to apply the standards it has applied in the past while acknowledging, as it always has, the protections guaranteed by the Equal Protection clause.

Respectfully submitted,

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Nos. 07-1428, 08-328

Supreme Court, U.S.
FILED
FEB 26 2009
OFFICE OF THE CLERK

In The

Supreme Court of the United States

FRANK RICCI, ET AL.,

Petitioners,

v.

JOHN DESTEFANO, KAREN DUBOIS-WALTON, THOMAS UDE, JR., TINA BURGETT, BOISE KIMBER, MALCOLM WEBER, ZELMA TIRADO, AND CITY OF NEW HAVEN,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Second Circuit

AMICUS CURIAE BRIEF OF BRIDGEPORT FIREFIGHTERS FOR MERIT EMPLOYMENT, INC. IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE

The *amicus curiae* is Bridgeport Firefighters for Merit Employment, Inc. ("BFME"). BFME is a non-profit organization of firefighters dedicated to the preservation of the merit system in municipal employment. BFME has 92 members, about one-third of Bridgeport, Connecticut's fire department. The District Court ruling and the Second Circuit affirmance in the present case already have had a direct, profound, and negative effect on the civil service merit system for promoting firefighters in Bridgeport, and have the potential to similarly affect municipalities across the state of Connecticut. Accordingly, BFME has a keen interest in the outcome of this case.[1]

SUMMARY OF ARGUMENT

As expressed by several decisions of the Connecticut Supreme Court during the last four decades,

[1] All parties have consented in writing to the filing of this brief. By letter dated January 28, 2009, counsel for Petitioners filed a blanket consent with the Clerk of the Court stating that they consent to the filing of any and all *amicus curiae* briefs in the present case. By letters dated February 13, 2009 and February 23, 2009, counsel for Respondents filed the same blanket consents with the Clerk of the Court. No counsel for any party in the present case has authored any part of this brief or contributed monetarily to its preparation or submission. No other person or entity, other than the *amicus curiae*, its members or its counsel, have made a monetary contribution to the preparation or submission of this brief.

the state of Connecticut has a strong public policy requiring strict compliance with civil service laws, and recognizing the importance of competitive examinations as part of the government's civil service system. By statute, Congress has made explicit its intent that federal courts adjudicating Title VII cases respect state law and interests. Therefore, although the present case was brought pursuant to federal law, the District Court and Second Circuit should not have ignored the state's crucial public policy. By doing so, these decisions pave the way for a dangerous departure from the merit-based civil service system for hiring and promoting firefighters and other civil servants in Connecticut.

Indeed, this dangerous precedent is no longer a hypothetical proposition. Several Bridgeport, Connecticut firefighters have sued the Bridgeport Civil Service Commission and its personnel director in federal court for re-weighting and re-scoring a promotional examination. The Bridgeport personnel director's explicit reliance on the Second Circuit decision in the present case to take this discriminatory action exemplifies the undesirable impact this decision already has had on a neighboring Connecticut city.

The decision in favor of Respondents is particularly disturbing because the District Court relied heavily on unsworn statements made in non-adversarial proceedings before the City of New Haven's Civil Service Commission. The Second Circuit inappropriately upheld the District Court ruling under these circumstances, especially where individual rights, the

public's safety, and Connecticut's civil service system are at stake.

ARGUMENT

I. THE DISTRICT COURT RULING AND THE SECOND CIRCUIT AFFIRMANCE DIRECTLY CONFLICT WITH STRONG PUBLIC POLICY OF THE STATE OF CONNECTICUT THAT REQUIRES STRICT COMPLIANCE WITH CIVIL SERVICE LAWS AND RECOGNIZES COMPETITIVE EXAMINATIONS AS THE CORNERSTONE OF A MERIT-BASED SYSTEM OF GOVERNMENT EMPLOYMENT.

The Charter of the City of New Haven (the "City Charter") sets forth a merit-based civil service system that mandates a strictly competitive process for the hiring and promotion of City firefighters. Specifically, "the 'Rule of Three' in the City Charter mandates that a civil service position be filled from among the three individuals with the highest scores on [the applicable competitive examination]." *Ricci v. DeStefano*, 554 F.Supp.2d 142, 145 (D. Conn. 2006), *aff'd*, 530 F.3d 87 (2d Cir. 2008), *cert. granted*, 129 S. Ct. 894 (2009).

As set forth in detail in Petitioners' brief, during the process of developing and administering the promotional examinations for the positions of lieutenant and captain in the New Haven fire department, the City complied with all federal guidelines, adhered to the highest professional standards of

testing, and afforded all interested parties with the assistance and tools necessary to succeed on the examinations. Nevertheless, Respondents' decision not to certify the examinations was upheld simply because insufficient numbers of minority candidates obtained scores that would make them eligible for promotions. Thus, the effect of the District Court ruling and the Second Circuit affirmance of that ruling is to nullify civil service examinations in Connecticut and, thereby, eviscerate merit-based employment for government employees.

Although Title VII is a federal statute, Congress still intended for federal courts to respect state law and interests when adjudicating Title VII cases. *See* 42 U.S.C. § 2000e-7 (provision of Title VII regarding its effect on state laws). In fact, the Second Circuit has acknowledged that a state "mandate that appointments to civil service positions be based on merit and fitness, to be ascertained by competitive examination where 'practicable', may not be blinked at or avoided." *Chance v. Board of Examiners*, 561 F.2d 1079, 1090 (2d Cir. 1977) (citation and internal quotation marks omitted). As set forth below, the outcome in the present case conflicts directly with the strong public policy of Connecticut. By ignoring this public policy, the District Court and Second Circuit have improperly opened the door for the very abuses the civil service laws were designed to eradicate.

For many years, the Connecticut Supreme Court has stressed the importance of strict compliance with

civil service laws, not only to ensure that municipalities hire and promote the most qualified individuals, but to stem the inevitable corruption and other ills that occur whenever these rules are relaxed. In *Resnick v. Civil Service Commission*, 156 Conn. 28, 238 A.2d 391 (1968), the Court first articulated this policy comprehensively:

> The purpose of [the civil service] laws is to ensure the appointment of personnel possessed of the qualifications which are necessary for a fit and intelligent discharge of duties pertaining to public office and to free public employees from the fear of political and personal prejudicial reprisal.

Id. at 31 (citations omitted).

> Strict compliance with the terms of the civil service law is required where the legislative intention is manifest in the light of the purposes of such a statute. . . . Good faith of the parties will not validate an illegal appointment and will not be sanctioned by the courts. . . . It is mandatory that every requirement of the civil service law be followed, and proof that substantial compliance exists is not enough. The doctrine of substantial compliance has no application to the performance of duty by those entrusted with the administration of the civil service law. It would open the door to abuses which the law was designed to suppress.

Id. at 32-33 (citations and internal quotation marks omitted).

The trial court in *Resnick* had upheld the City of Bridgeport's decision not to certify the plaintiff to an eligible list for legal aides, after he completed a written and oral examination. Specifically, the trial court had found that although the city charter prohibited questions in any test relating to religious or political affiliations, because oral examiners asked such questions of the plaintiff in a friendly manner and did not use his answers as criteria for rating his fitness, the city had substantially complied with the charter requirements. *Id.* at 30. Invoking the above principles, the Supreme Court rejected the trial court's analysis, and declared the examination illegal and void. *Id.* at 33.

Since the Court decided *Resnick*, it has reaffirmed its stringent position several times. Most significantly, the Court has made clear that municipalities cannot circumvent civil service requirements by manipulating the examination process in any way. For example, in *Walker v. Jankura*, 162 Conn. 482, 294 A.2d 536 (1972), the Court held that the City of Bridgeport could not delay an examination for police inspector to permit two of the defendants to acquire the experience necessary to be eligible for the examination. *Id.* at 490-91.

Bridgeport's city charter provided that an examination for the position at issue in *Walker* had to be held within 120 days of the time the position became vacant, and civil service regulations required that candidates have three years experience as a police captain to be eligible to take the examination of police

inspector. The plaintiff and one other candidate had the required three years' experience at the end of the 120 day period; the other candidates who sat for the examination did not have the three years' experience until ten days before the examination was actually administered. *Id.* at 485-86. Because the city did not strictly comply with the civil service law, the Court upheld the trial court's finding that the examination was void and illegal. *Id.* at 490-91.

Likewise, in *Cassella v. Civil Service Commission*, 202 Conn. 28, 519 A.2d 67 (1987), the Court upheld the decision of the New Britain civil service commission to demote the plaintiff, a member of the New Britain fire department, from lieutenant to private, because his promotional examination had been "fixed" and, therefore, he had not been promoted according to the rules of the city charter and the civil service commission. *Id.* at 36-38. In reaching its decision the Court stated:

> It cannot be overemphasized that proper competitive examinations are the cornerstone upon which an effective civil service system is built. Any violation of the law enacted for preserving this system, therefore, is fatal because it weakens the system of competitive selection which is the basis of civil service legislation.

Id. at 35 (citations and internal quotation marks omitted).

Perhaps most significantly, the Court more recently held that manipulation of examination scores by New Haven's police department violates the "Rule of Three" in the City Charter and civil service rules – the same rule that applies in the present case. In *Kelly v. New Haven*, 275 Conn. 580, 881 A.2d 978 (2005), the Court specifically addressed whether the City's practice of rounding police examination scores to whole numbers and then placing scores in groups violated this section of the City Charter and civil service rules. *Id.* at 582-83.

In reaching its decision, the *Kelly* Court emphasized "the importance of maintaining the integrity of [the City's] civil service system." *Id.* at 608 (citation and internal quotation marks omitted). The Court also noted that "the charter vests broad authority in the personnel director to prepare, conduct and score examinations. . . . This authority, however, does not include the authorization to act in a way that is unreasonable, arbitrary or illegal." *Id.* at 609-10. Construing the purpose behind the City Charter, the Court then found that the City's discretion did *not* allow it to manipulate the examination process by rounding scores to increase the number of individuals eligible for promotion:

> The civil service board was designed to eliminate *as far as practicable* the element of partisanship and personal favoritism in making appointments. . . . Promotion on the basis of merit, not nepotism, has been the guiding rule. . . . Thus, the defendants' discretion in

> making such promotional decisions must be limited. . . . [N]o one would dispute that this discretionary power is not validly exercised in the name of merit selection if, in awarding a position, the department head is predisposed to excluding certain candidates from the position based upon factors unrelated to performance capability and compatibility.
>
> [T]he rounding of scores, when applied to a process under which candidates with tie scores are treated as one score group warranting equal consideration under the rule of three, violates the spirit and the letter of the civil service provisions of the charter.

Id. at 614-16 (citations and internal quotation marks omitted; emphasis in original). *See also Broadnax v. New Haven*, 270 Conn. 133, 160, 851 A.2d 1113 (2004) (Court held that "underfilling" in New Haven's fire department was prohibited because it violated the City Charter, ordinances and civil service rules); *New Haven Firebird Society v. The Board of Fire Commissioners of the City of New Haven*, 32 Conn. App. 585, 591-93, 630 A.2d 131, *certif. denied*, 228 Conn. 902, 634 A.2d 295 (1993) (Court held that "stockpiling" in New Haven's fire department was illegal because it violated New Haven's civil service law).

In the present case, the District Court and Second Circuit sanctioned a practice that allows a municipality to manipulate the competitive examination process by ignoring its results completely. As set forth in *Kelly*, this outcome gives Respondents unreasonable

discretion in making promotions in the City's fire department – discretion that clearly violates the Rule of Three in the City Charter. Although merit considerations are important for any government position, they are even more essential in positions where public safety is implicated, as well as the safety of firefighters. In these situations, commanding officers must make life and death decisions. Consequently, the Second Circuit has set a dangerous precedent for the City of New Haven by affirming the District Court ruling.

Furthermore, the Second Circuit affirmance has an even more widespread impact, because it sends the wrong message to municipalities throughout the state of Connecticut. The message is that municipalities need not strictly comply with civil service laws anymore, and competitive examinations are no longer the cornerstone of the civil service system. This will open the door to the very abuses the civil service laws were designed to eradicate.

The citizens in Connecticut's cities are especially diverse, consisting of a multitude of racial, ethnic, national and religious groups. The civil service laws are designed not only to ensure promotion of the individual best fit for a particular position, but to deter elected officials from handing out favors to constituents as "payment" for votes. Now, in the guise of helping minorities to succeed, municipalities will be free to discount or even ignore merit and fitness as criteria for hiring and promotion, and they will also be free to return to a system where partisanship and

personal favoritism rule the day. Such a system violates the clear public policy of Connecticut and cannot be countenanced.

II. THE SECOND CIRCUIT DECISION HAD AN IMMEDIATE DISCRIMINATORY IMPACT ON THE PROMOTION OF FIREFIGHTERS IN THE CITY OF BRIDGEPORT'S FIRE DEPARTMENT.

The dangerous precedent set by the Second Circuit decision is no longer a hypothetical proposition – it is very real. In the summer of 2008, a number of Bridgeport, Connecticut firefighters sued the Bridgeport Civil Service Commission and its personnel director, challenging the personnel director's decision to re-weight and re-score the examination given to determine who should be promoted to the position of lieutenant in the Bridgeport fire department. Most significantly, the Bridgeport personnel director relied heavily on the Second Circuit decision in the present case to reach the conclusion that he had no alternative but to tamper with the test results. *See Timothy Bottone, et al. v. City of Bridgeport, et al.*, Civil Action No. 3:08 CV 01320 (JCH) (D. Conn.)[2]

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[2] BFME respectfully requests that this Court take judicial notice of the court file in the *Bottone* case. *See Wells v. United States*, 318 U.S. 257, 260 (1943) (federal courts may take judicial notice of proceedings in district court cases).

In *Bottone*, the original scoring methodology, which test takers had notice of prior to sitting for the examination, weighted the examination 50% for the written component, 45% for the oral component, and 5% for seniority. After the examination was administered and scored, the personnel director claimed that the results of the examination had a disparate impact on minority candidates which required immediate action to correct. The personnel director then changed the scoring methodology to 25% for the written component and 75% for the oral component.

This re-weighting and re-scoring ultimately provided a revised promotional list that elevated the scores of minority candidates and adversely affected the plaintiffs' opportunities for promotion. As set forth above, the Bridgeport personnel director took this action – an action arguably even more egregious than that taken by Respondents – claiming that he was required to do so by federal law, specifically, "adhering to the holding in *Ricci v. DeStefano*, 530 F.3d 87 (2d Cir. 2008)." *See Timothy Bottone, et al. v. City of Bridgeport, et al.*, Civil Action No. 3:08 CV 01320 (JCH) (D. Conn.), Defendant City of Bridgeport's Objection to Plaintiffs' Motion to Disqualify Counsel, dated October 7, 2008, at 3.

The negative repercussions of the Second Circuit decision have already extended beyond New Haven, to a neighboring Connecticut city. These negative repercussions must not spread any further and continue to marginalize Connecticut's important merit-based civil service system. The present case

gives this Court the unique opportunity to act decisively, thereby ensuring that those chosen to fill civil service positions in all of Connecticut's municipalities are selected based solely on merit, as mandated by Connecticut law.

III. THE DISTRICT COURT IMPROPERLY RELIED ON UNSWORN STATEMENTS MADE IN NON-ADVERSARIAL PROCEEDINGS TO DETERMINE THAT RESPONDENTS HAD A GOOD FAITH DEFENSE UNDER TITLE VII.

Respondents primarily argued before the District Court that their decision not to certify the examinations was justified because it was based on a good faith belief that to do so would violate Title VII. *Ricci v. DeStefano*, 554 F.Supp.2d at 148 n. 4. The District Court wholeheartedly agreed, as succinctly expressed by the Second Circuit in its summary order adopting the District Court opinion and affirming its judgment: "Because the Board, in refusing to validate the exams, was simply trying to fulfill its obligations under Title VII when confronted with test results that had a disproportionate racial impact, its actions were protected." *Ricci v. DeStefano*, 530 F.3d 87 (2d Cir. 2008).

The determination that Respondents acted in good faith was based largely on statements made in five meetings before the New Haven Civil Service Board (the "CSB") between January and March 2004. Indeed, the District Court cited in detail and relied on

what it referred to as testimony provided at these "hearings" by a number of individuals, including "expert witnesses." *Ricci v. DeStefano*, 554 F.Supp.2d at 145-150. Nevertheless, the proceedings before the CSB were *not* formal adversarial hearings where witnesses testified under oath, where any rules of evidence were observed, or where cross-examination of witnesses was permitted. As a result, the conclusions of both the District Court and the Second Circuit finding that Respondents had a good faith defense sufficient to deny Petitioners a trial on their discrimination claims was based on nothing more than unsworn, hearsay statements.

For example, the District Court apparently valued unsworn and inherently unreliable statements made by minority representatives, to justify Respondents' actions here. The District Court cited statements made by Donald Day, a representative of the Northeast Region of the International Association of Black Professional Firefighters, who argued against certification, claiming "there was something inherently wrong with this test because minorities did not score as highly [as they did on previous tests]," and urging the CSB to speak with the director of the Civil Service Commission in Bridgeport, Connecticut, "to find out what Bridgeport is doing different [sic] than New Haven as they have more diversity in their firefighter ranks." *Ricci v. DeStefano*, 554 F.Supp.2d at 146 (citation and internal quotation marks omitted). The District Court also cited statements of Ronald Mackey, the Internal Affairs Officer for the

same organization, who proposed that New Haven "adjust the test as Bridgeport had done, in order to meet the criteria of having a certain amount of minorities get elevated to the rank of Lieutenant and Captain." *Id.* at 147 (citation and internal quotation marks omitted).

Neither Mr. Day nor Mr. Mackey was identified as an expert with specialized knowledge in the testing field, and in fact, they provided no reasonable bases for the conclusions that there was something "inherently wrong" with the test or that it should be "adjusted." Their positions in a black firefighter association indicate that these individuals clearly had one agenda – to advance what they believed to be in the best interests of black firefighters. Because their statements were not made under oath and they were not subject to the scrutiny of cross-examination, there was no formal mechanism to challenge the accuracy of their statements, their competency as "witnesses," or to expose any biases these men may have harbored.[3]

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[3] It is ironic that Mr. Day and Mr. Mackey argued so forcefully in 2004 that New Haven should follow Bridgeport's example, strongly implying that Bridgeport was doing things the right way to promote diversity, but in 2008, the personnel director for Bridgeport's Civil Service Commission determined that the Second Circuit's holding in the present case required him to re-weight and re-score a lieutenant's examination to elevate the positions of minority candidates.

To allow any party to prevail under these circumstances is highly problematic. However, the import of the Second Circuit decision is of even greater concern when one considers what is at stake in the present case – individuals' rights to equal protection under the law, the public's safety, and the vitality of Connecticut's entire merit-based civil service system.

CONCLUSION

For all of the reasons set forth herein, the judgment of the Second Circuit should be reversed.

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121

(10) (8)

Nos. 07-1428, 08-328

Supreme Court, U.S.
FILED
FEB 25 2009
OFFICE OF THE CLERK

In The
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FRANK RICCI, ET AL.,

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v.

JOHN DESTEFANO, ET AL.,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF THE CATO INSTITUTE, REASON FOUNDATION, AND THE INDIVIDUAL RIGHTS FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

This case presents the question whether Title VII and the Equal Protection Clause allow a government employer to reject the results of a civil-service selection process because it does not like the racial distribution of the results. Specifically:

1. When a content-valid civil-service examination and race-neutral selection process yield unintended, racially disproportionate results, do a municipality and its officials racially discriminate in violation of the Equal Protection Clause or Title VII when they reject the results and the successful candidates to achieve racial proportionality in candidates selected?

2. Does an employer violate 42 U.S.C. § 2000e-2(*l*), which makes it unlawful for employers "to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race," when it rejects the results of such tests because of the race of the successful candidates?

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INTEREST OF *AMICI CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, the Cato Institute publishes books and studies, conducts conferences, publishes the annual *Cato Supreme Court Review*, and files *amicus* briefs with the courts. This case is central to Cato because it implicates the Institute's strong belief that all citizens should be treated equally before the law and that the government should not create incentives for employers to discriminate based on race in their hiring and promotion practices.

Reason Foundation is a nonpartisan and nonprofit 501(c)(3) organization, founded in 1978. Reason's mission is to promote liberty by developing, applying, and communicating libertarian principles and policies, including free markets, individual liberty, and the rule of law. Reason advances its mission by publishing Reason Magazine, as well as

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[1] The parties have filed blanket written consents to the filing of *amicus* briefs in this case. This brief was not authored in whole or in part by a party or counsel for a party, and no person or entity, other than *amici curiae*, their members, and their counsel, made a monetary contribution to the preparation and submission of this brief.

commentary on its website, reason.com, and on www.reason.tv, and by issuing policy research reports, which are available at reason.org. Reason also communicates through books and articles in newspapers and journals, and appearances at conferences and on radio and television. Reason's personnel consult with public officials on the national, state, and local level on public policy issues. Reason selectively participates as *amicus curiae* in cases raising significant constitutional issues, to further Reason's avowed purpose to advance "Free Minds and Free Markets."

The Individual Rights Foundation ("IRF") was founded in 1993 and is the legal arm of the David Horowitz Freedom Center. The IRF is dedicated to supporting litigation involving free speech, associational rights, and civil rights issues, and its lawyers participate in educating the public about the importance of the Fourteenth Amendment's guarantee of equal protection of the law. To further its goals, IRF attorneys appear in litigation and file *amicus curiae* briefs in appellate cases involving Equal Protection and other constitutional issues. The IRF opposes attempts from anywhere along the political spectrum to undermine equality of rights, which is a fundamental component of individual rights in a free society.

STATEMENT OF THE CASE

In 2003, the City of New Haven, Connecticut sought to fill captain and lieutenant vacancies in its fire department. New Haven's Charter and Civil Service Regulations mandated that hiring and promotions be based solely on merit as determined by a competitive examination. Pet.App. 74a-77a, 80a-82a, 85a-96a, 89a-113a. To develop its exam, New Haven hired an outside testing firm with experience in public safety. Through rigorous procedures, that firm developed an exam that tested the relevant knowledge, skills, and abilities necessary for minimally competent performance in the captain and lieutenant positions. Pet.App. 308a-328a. Because New Haven had seen racial disparities in the results of previous civil service exams, the firm did all it could to mitigate the impact of race while maintaining the integrity of the exams. *E.g.*, Pet.App. 150a-154a, 160a-161a, 262a-264a, 337a-343a.

The exam results revealed racial disparities among those seeking promotion, with non-Hispanic whites generally outperforming African-Americans and Hispanics. These results mirrored those of previous exams in New Haven. Pet.App. 423a-427a, 950a-957a. Given the limited number of vacancies and a civil service rule that required those promoted to a given position to be among the top three performers, the new lieutenants would all have been non-Hispanic and white, as would the new captains, except for one or possibly two, who could have been Hispanic. Pet.App. 439a-445a, 475a-476a.

After such an exam, the Civil Service Board normally would certify a list of those eligible for promotion, a ministerial task. Pet.App. 89a. That did not happen in this case. Before the Civil Service Board took up the matter, a local preacher and political power broker called the mayor and made it clear that he did not want the results of the exam certified because of the racial disparities. Pet.App. 812a-816a, 882a-883a. City officials initially tried to impugn the validity of the exams, but the firm that designed the exam refused to capitulate and offered to explain the exam's content and establish its validity. Pet.App. 331a-334a. Soon after, Respondent Thomas Ude, Jr., the city's counsel, sent a letter to the Board raising the specter of a Title VII violation if the promotion lists were certified. Pet.App. 428a-436a, 439a-445a.

The Board met four times to discuss whether to certify the lists. At the initial hearing, Ude stated that the exam results had a "very significant disparate impact" and that the City need not find that the exam was "indefensible" and not job-related – that it violated Title VII – for the city to "take action." Pet.App. 8a. At the final hearing, Ude stated that certifying the lists "would not be consistent with federal law" and noted that, if the city were sued under Title VII, "it is the employer's burden to justify the use of the examination. . . ." Pet.App. 18a. Two alderpersons present at the meeting urged the Board not to certify for the sake of "civil rights" requirements. Pet.App. 458a-459a, 575a-582a.

The Board deadlocked on whether to certify the lists, hence the lists were not certified and no one was promoted. Pet.App. 586a-589a. Some of the firefighters denied promotion sued the City and several individuals under Title VII and the Equal Protection Clause. The district court granted summary judgment for the defendants, holding that the City's desire to comply with "the letter and spirit of Title VII" by avoiding an adverse impact claim was a legitimate, nondiscriminatory reason under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1993), for its failure to certify the lists. Pet.App. 25a. Turning to the equal protection claim, the district court held that the City's refusal to certify the results was not intentional discrimination under the Equal Protection Clause because it had acted based on its concern that, *inter alia*, certifying the lists "would likely subject the City to Title VII lawsuits from minority applicants that, for political reasons, the City did not want to defend." Pet.App. 47a.

The Second Circuit affirmed, adopting the district court's opinion in its entirety and adding a coda. Supp.Pet.App. 4a-6a. In dissent from the denial of the petition for rehearing en banc, Judge Cabranes noted that, "[u]nder the District Court's rationale, it appears that any race-based employment decision undertaken to avoid a threatened or perceived Title VII lawsuit is immune from scrutiny under Title VII. This appears to be so, moreover, regardless of whether the employer has made any efforts to verify that a valid basis exists for the putative Title VII

suit." Supp.Pet.App. 28a-29a. Judge Cabranes expressed doubt about this "sanctioning [of] race-based employment decisions in the name of compliance with Title VII." Supp.Pet.App. 29a.

Petitioners and other *amici* address the constitutional and statutory errors contained in the decisions below. This brief focuses instead on the practical problems and skewed incentives that naturally follow a decision allowing employers to justify race-based discrimination merely because valid exams produce racially disparate results.

SUMMARY OF THE ARGUMENT

If allowed to stand, the lower courts' opinions would present employers with an easy choice whenever valid selection procedures produce racially disparate results: proceed in the face of those results and face the possibility of a Title VII lawsuit; or throw out the results and avoid that risk. In other words, employers will have every reason to "undo" race-based statistical disparity even if that disparity is entirely innocuous and would easily survive legal challenge, even if doing so may be detrimental to the employer or (as here) the public, and even though doing so requires racial discrimination against certain employees. Every employer in the City of New Haven's position – wanting to avoid litigation and the negative publicity accompanying race discrimination

suits – will throw out the results of objectively race-neutral exams.

Petitioners' reading of Title VII, by contrast, provides the proper incentives to employers and ensures that they treat all employees equally and fairly. Under that reading, the law does not suggest that employers should discriminate by race every time there is a racial disparity. Instead, employers must determine whether a test that produces a racial disparity poses a real risk of a Title VII violation.

ARGUMENT

Title VII makes it unlawful to "fail or refuse to hire . . . any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race[.]" 42 U.S.C. § 2000e-2(a)(1). Claims under this section are commonly called "disparate treatment" claims. Where the employee alleges that intentional discrimination caused a decision, a disparate treatment claim is analyzed under the burden-shifting framework of *McDonnell Douglas v. Green*: the employee must establish a prima facie case of discrimination, after which the burden shifts "to the employer to articulate some legitimate, nondiscriminatory reasons" for the decision, and finally the burden shifts back to the employee to prove that the reasons offered by the employer were "pretext." *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1993).

Title VII also outlaws certain facially neutral employment practices that have adverse effects on members of one race as compared to members of another race. 42 U.S.C. § 2000e-2(k)(1)(A)(i). Claims under this section are commonly called "adverse impact" claims. Like disparate treatment claims, adverse impact claims are analyzed under a burden-shifting framework: the employee must establish a prima facie case of discrimination, after which the burden shifts to the employer to "demonstrate that the challenged practice is job related for the position in question and consistent with business necessity," and finally the burden shifts back to the employee to demonstrate an alternative employment practice that is available, equally valid, and less discriminatory that the employer has refused to adopt. *Id.*; *see also Watson v. Forth Worth Bank & Trust*, 487 U.S. 977, 994 (1988). Because the employment practice in an adverse impact claim is facially neutral, *see, e.g., Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 355 n.15 (1977), the hallmark of a prima facie disparate impact claim is mere statistical disparity – that members of one race have done better than those of another. Indeed, strong evidence of a prima facie case is also what the EEOC guidelines consider to be evidence of adverse impact, which occurs when the selection or promotion rate for any race is less than 80 percent of the rate for the group with the highest rate. *Watson*, 487 U.S. at 994; *see* 29 C.F.R. pt. 1607 (2008). Consequently, a prima facie disparate impact claim is fairly easy to establish. It is in the second and third steps that the real work is done.

Petitioners' claim is one of disparate treatment under *McDonnell Douglas*. The district court, after assuming that Petitioners had established prima facie discrimination, concluded that Respondents had established a legitimate, nondiscriminatory reason for their decision not to certify the exam results: fear of a Title VII "adverse impact" claim. Pet.App. 25a-26a.[2] The district court concluded, and the Second Circuit affirmed, that this fear was a legitimate, nondiscriminatory reason because there was an undisputed statistical disparity that would have supported a prima facie adverse impact claim against Respondents. Pet.App. 25a; Supp.Pet.App. 4a-6a.[3]

The court did not find, however, that the exams were not job-related. In fact, the only evidence in the record suggests the opposite: Respondents commissioned a post-exam validation study and were aware that it would have validated the tests, but decided to block the study. Pet.App. 190a, 329a-339a. Nor did the court find that Respondents had shown an alternative, less-discriminatory test.

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[2] The district court arguably found additional motivations for Respondents' decision, *see* Pet.App. 47a, but fear of a Title VII adverse impact claim was the primary motivation, as the Second Circuit recognized, *see* Supp.Pet.App. 5a-6a ("[T]he Board, in refusing to validate the exams, was simply trying to fulfill its obligations under Title VII when confronted with test results that had a disproportionate racial impact. . . .").

[3] The district court actually suggested that something less than a prima face adverse impact claim might justify Respondents' actions. *See* Pet.App. 38a.

In other words, the court held that statistical disparity, which might have led to a Title VII adverse impact suit, justified Respondents' decision to throw out the results. Even beyond the questionable legal basis for such a ruling, this new rule produces the perverse practical result that exams will always be discarded if they produce a disparity – regardless of the reason for that disparity and even if the exams are race-neutral. Petitioners' suggested framework makes much more sense because it ensures that exams that produce disparity will not be discarded unless there is a real risk that they violate Title VII.

I. THE LAW CREATED BY THE LOWER COURTS WILL ENCOURAGE EMPLOYERS TO THROW OUT RACE-NEUTRAL TESTS AND OTHER CRITERIA WHENEVER THEY PRODUCE RACIAL DISPARITIES.

If the decision below stands, employers making employment decisions based on race-neutral tests that produce racially disparate results will have every reason to throw out the results. If they do so, they will be immune from Title VII liability because the employees harmed by that act cannot overcome the employers' stated legitimate, nondiscriminatory reason. On the other hand, if they do not throw out the results, they may face a Title VII adverse impact claim by other employees. Between total immunity and possibly having to defend against a claim, rational employers will throw out the results.

The perils and perversity of this incentive are obvious. First, employers will be impelled to jettison tests that are entirely innocuous and would easily survive legal challenge. Second, many of those tests ensure efficiency and sometimes – as in this case – public safety. Third, the act of throwing out those tests itself constitutes racial discrimination. It is bad enough when misplaced fear of noncompliance with the law affects lawful behavior; it is worse when what is generated by that misplaced fear is not just inefficiency or danger, but racial discrimination as well.

Further, the more employers heed the incentive to throw out race-neutral tests that produce racially disparate results, the more Title VII is upended. After all, an employer who throws out the results of a test merely because "too many" employees of a certain race did well establishes a de facto quota. And *Watson* made clear that de facto quotas are anathema to Title VII:

> Preferential treatment and the use of quotas by public employers subject to Title VII can violate the Constitution, and it has long been recognized that legal rules leaving any class of employers with "little choice" but to adopt such measures would be "far from the intent of Title VII." . . . If quotas and preferential treatment become the only cost-effective means of avoiding expensive litigation and potentially catastrophic liability, such measures will be widely adopted. The prudent employer will be careful to ensure that its programs are discussed in euphemistic

> terms, but will be equally careful to ensure that the quotas are met. Allowing the evolution of disparate impact analysis to lead to this result would be contrary to Congress' clearly expressed intent. . . .

Watson, 487 U.S. at 991 (internal citations omitted).

Moreover, such an employer also contravenes the Title VII provision forbidding alteration of test results. *See* 42 U.S.C. § 2000e-(2)(*l*). Respondents' reading of Title VII not only fails to effect the aims of the statute, it defies them. Respondents' reading of the statute would have Title VII hoist by its own petard.

Similarly, the more employers heed the incentive to throw out test results based merely on race-based statistical disparity, the more unintentional discrimination will be replaced by intentional discrimination. As Petitioners explain, that tradeoff violates the Equal Protection Clause. Pet.Br. 21-42.

II. PETITIONERS' READING OF TITLE VII PROVIDES EMPLOYERS THE PROPER INCENTIVES.

Petitioners, by contrast, have suggested a sensible reading of Title VII that would provide employers with incentive to guard the rights of all employees and balance those rights against business requirements and public safety. Petitioners suggest that employers, when faced with race-based statistical disparity in a test, can jettison the results only if

there is a "strong basis in evidence" that the test violates Title VII. Pet.Br. 58-62.

Before administering a test, most employers will presumably have already ensured that the test is job-related (and possibly that they have not refused reasonable, less discriminatory alternatives). Such employers will not face a "strong basis in evidence" for an adverse impact claim against them. That is what happened in this case. For those employers who administer tests without knowledge of whether they comply with Title VII, the tests can be analyzed later for compliance. If an employer discovers a "strong basis in evidence" for an adverse impact claim stemming from a particular test, the employer can (and probably should) jettison it. The employer need not be certain that the test establishes an adverse impact claim.

This reading of Title VII ensures that employers can and will maintain tests that, although they generate race-based statistical disparity, are good for both business and the public interest generally, and are consistent with Title VII. It also ensures that employees who do well on such tests are protected, while allowing employers to prophylactically discard test results if there is a "strong basis in evidence" that the results violate Title VII.

CONCLUSION

"It is a sordid business, this divvying us up by race." *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 511 (2006) (Roberts, C.J., dissenting). Nowhere is that statement more true than in the through-the-looking-glass situation where a legal rule gives employers every reason to abandon job-related, race-neutral tests and instead discriminate by race, merely to eliminate a statistical disparity. This Court should reverse the Second Circuit's judgment.

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February 25, 2009

124 35 (35)

Nos. 07-1428, 08-328

FILED
FEB 2 6 2009
OFFICE OF THE CLERK
SUPREME COURT, U.S.

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AMICUS BRIEF OF THE CENTER FOR INDIVIDUAL RIGHTS, THE CENTER FOR EQUAL OPPORTUNITY, AND THE AMERICAN CIVIL RIGHTS INSTITUTE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

For the purposes of Title VII and the Equal Protection Clause, does a government employer's refusal to follow an established procedure for the hiring of a person because of that person's race constitute intentional racial discrimination if the refusal was based upon the employer's various concerns about the racial balance among the successful applicants?

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INTEREST OF AMICI CURIAE[1]

The Center for Individual Rights ("CIR") is a public interest law firm based in Washington, D.C. It has litigated many discrimination lawsuits, including several in this Court. It has a particular interest in, and has brought numerous cases concerning, what it views as unconstitutional racial classifications by government. *E.g.*, *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Grutter v. Bollinger*, 539 U.S. 306 (2003).

The Center for Equal Opportunity and the American Civil Rights Institute are nonprofit research, education, and public advocacy organizations. These *amici* devote significant time and resources to the study of the prevalence of racial, ethnic, and gender discrimination by the federal government, the several states, and private entities. They educate the American public about the prevalence of discrimination in American society, and publicly advocate the cessation of racial, ethnic, and gender discrimination by the federal government, the several states, and private entities. These *amici* also have participated as

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[1] Blanket consent letters have been filed with this Court. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

amicus curiae in numerous United States Supreme Court cases relevant to the analysis of this case.

SUMMARY OF ARGUMENT

The court below concluded that the decision not to hire the petitioners (the "firefighters") was race-motivated but not "intentional discrimination." Consequently, it is contrary to every decision this Court ever has issued concerning the meaning of that phrase.

Specifically, the Second Circuit followed a rule declaring that any effort to avoid the disparate impact of a selection device that does not use explicit racial classifications is *never* intentional discrimination. Thus, under this rule, even where the employer has no real fear of any liability – because, for example, its selection criteria is obviously job-related (such as language fluency for a translator) – it may engage in flagrantly race-motivated conduct to "remedy" any disparate impact, provided it does not use explicit racial classifications. This interpretation of both Title VII and the Equal Protection Clause is just wrong. The primary purpose of both Title VII and the Equal Protection Clause is to prevent intentional discrimination, *i.e.*, the consideration of a prohibited factor in an employment or other decision. There can be no doubt that that is what happened here, and the judgment of the court below must be reversed.

ARGUMENT

I. THE COURT BELOW'S CONCLUSION THAT THE DEFENDANTS DID NOT ENGAGE IN INTENTIONAL DISCRIMINATION IS WRONG

Section 703(a)(1) of Title VII states:

> It shall be an unlawful employment practice for an employer –
>
> (1) to fail or refuse to hire . . . any individual . . . because of such individual's race, color, religion, sex, or national origin.

There can be no dispute that the defendants refused to hire (or promote) plaintiffs. The only question is whether, with all facts and inferences favoring the firefighters, that refusal was because of any individual's race. It was.

Accordingly, the firefighters met their summary judgment burden of showing that race was a "motivating factor" for the decision not to hire them (42 U.S.C. § 2000e-2(m)), and that defendants engaged in intentional discrimination invoking strict scrutiny under the Equal Protection Clause.

A. Defendants Were Motivated By Race

The district court opinion in this case whose reasoning was adopted by the court below identified a substantial number of purported different race-connected motivations for the defendants' decision not to hire plaintiffs. *E.g.*, *Ricci v. DeStefano*, 554 F. Supp. 2d 142, 152 (D. Conn. 2006), *aff'd*, 530 F.3d 87 (2d Cir. 2008):

> Plaintiffs' evidence -- and defendants' own arguments -- show that the City's reasons for advocating non-certification were related to the racial distribution of the results. As the transcripts show, a number of witnesses at the CSB [New Haven Civil Service Board] hearings, including Kimber, mentioned "diversity" as a compelling goal of the promotional process. Ude, Marcano, and Burgett specifically urged the CSB not to certify the results because, given the number of vacancies at that time, no African-Americans would be eligible for promotion to either Lieutenant or Captain, and no Latinos would be eligible for promotion to Captain. They believed this to be an undesirable outcome that could subject the City to Title VII litigation by minority firefighters, and the City's leadership to political consequences.

> Had the tests not yielded what defendants perceived as racially disparate results, defendants would not have advocated rejecting the tests, and plaintiffs would have had an opportunity to be promoted.

Id. at 162:

> [Defendants] acted based on the following concerns: that the test had a statistically adverse impact on African-American and Hispanic examinees; that promoting off of this list would undermine their goal of diversity in the Fire Department and would fail to develop managerial role models for aspiring firefighters; that it would subject the City to public criticism; and that it would likely subject the City to Title VII lawsuits from minority applicants that, for political reasons, the City did not want to defend.

As the firefighters' brief shows, these are euphemistic descriptions of defendants' concerns, with little evidence to support them – especially on defendants' summary judgment motion, when the evidence is considered with all disputes and inferences favoring the firefighters. But even these euphemistic descriptions demonstrate that the firefighters met their summary judgment

burden of proving a genuine issue of material fact on whether the refusal to hire them was because of their race or color.

In general, "intentional discrimination" on the basis of race is the consideration of race in making a decision. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239 (1989) (plurality op.) ("In passing Title VII, Congress made the simple but momentous announcement that sex, race, religion, and national origin are not relevant to the selection, evaluation, or compensation of employees."); *id.* at 240 (plurality op.) ("We take these words to mean that gender must be irrelevant to employment decisions. . . ."); *id.* at 242 (plurality op.) ("We conclude . . . that Congress meant to obligate [a Title VII plaintiff] to prove that the employer relied upon sex-based considerations in coming to its decision.").

A consideration does not avoid falling under the rubric of being "race-based" simply because the employer believes that there are non-racial consequences that would flow from hiring persons of a particular race – the loss of business from racists, co-employee dissatisfaction or departures, political consequences, etc. Title VII does not permit an employer to rely upon discriminatory "customer preference" as a legitimate business justification. *E.g.*, *Diaz v. Pan American World Airways, Inc.*, 442 F.2d 385, 387 (5th Cir. 1971) (sex was not a bona fide occupational qualification for flight attendant notwithstanding lower court's

finding that passengers "overwhelmingly preferred to be served by female stewardesses").[2] Neither does the Constitution. *See Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) (state court violated the Equal Protection Clause when, in its analysis of the best interests of the child, it weighed the fact that child's mother was in a mixed-race marriage; "The question, however, is whether the reality of private biases and the possible injury they might inflict are permissible considerations for removal of an infant child from the custody of its natural mother. We have little difficulty concluding that they are not.").

Nor does it matter that the employer did not hire anyone, *i.e.*, that it superficially treated people the same. *Ricci*, 554 F. Supp. 2d at 161. The question is not whether those who had achieved different levels of success on the civil service tests were treated identically; it is whether defendants treated plaintiffs the same as defendants would have treated hypothetical African American candidates had they done just as well as plaintiffs had on the exams.

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[2] *Diaz* actually considered whether sex was a bona fide occupational qualification. But that only demonstrates that there could be no dispute that "customer preference" was not a "non-discriminatory" reason for the defendants' policies of making employment decisions influenced by an employee's sex. The BFOQ inquiry is made only after a determination that the defendant has engaged in intentional discrimination.

Here, defendants' motivations were racial. Defendants were concerned that hiring plaintiffs would "undermine their goal of diversity in the Fire Department"; "would fail to develop managerial role models for aspiring firefighters"; and "would subject the City to public criticism." *Ricci v. DeStefano*, 554 F. Supp. 2d at 162. Each of these concerns is directly related to most of the plaintiffs' race, and thus constitute racial considerations that would support a finding of intentional race discrimination.

Indeed, the first two of these rationales have been considered as possible compelling governmental interests under the Equal Protection Clause (albeit in the educational context only). *Grutter v. Bollinger*, 539 U.S. 306 (2003) (diversity in higher education was a compelling governmental interest); *Wygant v. Jackson Bd. Of Education*, 476 U.S. 267, 276 (1986) (plurality op.) (rejecting role model theory as compelling governmental interest for race-conscious school teacher layoffs). The important point here is that questions like "strict scrutiny" and "compelling governmental interest" are only reached *as a justification for intentional discrimination*. *E.g.*, *Wisconsin v. City of New York*, 517 U.S. 1, 18 n.8 (1996) ("Strict scrutiny of a classification affecting a protected class is properly invoked only where a plaintiff can show intentional discrimination by the Government."). And the third rationale (avoiding "public criticism") is nearly indistinguishable from the "customer preference"

rationale discussed above.[3]

The courts below also identified avoiding Title VII liability as a possible motivation. The firefighters here argue that they raised a genuine issue of material fact as to whether that purported motivation was a pretext. But even if it were not a pretext, and even if "avoiding Title VII liability" were actually a non-discriminatory motivation, it would still have been only one of several race-based motivations. That is, its existence would only go to damages, not liability. 42 U.S.C. § 2000e-2(m) ("an unlawful employment practice is established when the complaining party demonstrates that race . . . was a motivating factor for any employment practice, even though other factors also motivated the practice").

B. The Rule That Some Race-Motivated Refusals To Hire Are Not Intentional Discrimination Is Incoherent And Wrong

The courts below held that a racially-motivated refusal to hire does not constitute

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[3] Similarly, the fact that a particular race-motivated decision might be facially race-neutral, so all-important to the courts below, *might* go to whether the decision was narrowly-tailored under the Equal Protection Clause. *Grutter*, 539 U.S. at 339. But, again, narrow-tailoring analysis is part of the strict scrutiny given to all forms of intentional discrimination.

"intentional discrimination" in violation of Section 703 or the Equal Protection Clause. *Ricci*, 554 F. Supp. 2d at 160 ("Defendants' motivation to avoid making promotions based on a test with a racially disparate impact, *even in a political context*, does not, *as a matter of law*, constitute discriminatory intent, and therefore such evidence is insufficient for plaintiffs to prevail on their Title VII claim." (emphasis added)); *id.* at 162 (rejecting Equal Protection Clause claim because "[n]one of the defendants' expressed motives could suggest to a reasonable juror that defendants acted 'because of' animus against non-minority firefighters who took the . . . exams"). These rulings are wrong.

In reaching its conclusion, the district court applied the following rule: "'nothing . . . precludes the use of race-neutral means to improve racial and gender representation . . . . [T]he intent to remedy the disparate impact of the prior exams is not equivalent to an intent to discriminate against non-minority applicants.'" *Ricci*, 554 F. Supp. 2d at 158-59 (*quoting Hayden v. County of Nassau*, 180 F.3d 42, 51 (2d Cir. 1999)). The gist of the district court's opinion, then, was that the firefighters' evidence of defendants' desire to avoid a substantially white promotion cadre for political or other reasons simply did not prove intentional discrimination in violation of either Title VII or the Equal Protection Clause. In affirming the district court's judgment based upon "the reasons stated in the thorough, thoughtful, and well-reasoned opinion of the court below," *Ricci v. DeStefano*, 530

F.3d 87 (2d Cir. 2008), the circuit court adopted that reasoning.

By "race neutral" or "facially neutral" acts, the courts below mean *any* acts that do not create explicit racial classifications. (Race must obviously be a motivation if one is trying to remedy a racially disparate impact.) *E.g.*, *Ricci v. DeStefano*, 530 F.3d 88, 90 (2d Cir. 2008) (Parker, J., concurring in the denial of *en banc* rehearing) (referring to "facially neutral, albeit race-conscious" actions). That is, the courts below distinguished between action that uses race explicitly, and facially-neutral but racially-motivated conduct in certain contexts. This Court has never made any such distinction. Nor should it. It makes little sense to treat two identical employment actions differently depending upon whether the employer happened to keep its racial motivation a secret or not. But, under the Second Circuit's rule, if an employer announces that it will hire those from a civil service list with list numbers divisible by five, and the (unannounced) reason it is doing so is that such a procedures will result in three whites and two non-whites being hired, that is a "facially neutral but race-motivated" remedy to disparate impact. If it announces that it will hire the top three scoring whites and the top two scoring non-whites, and does so, then it has used an explicit racial classification and has engaged in intentional discrimination. Nothing in this Court's opinions has suggested that such a distinction is a reasonable interpretation of Title VII or the Equal

Protection Clause.

If taken seriously, the analysis of the courts below would mean that colleges and professional schools would need worry no longer about inconvenient precedents like *Gratz v. Bollinger*, 539 U.S. 244 (2003), and *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). Instead of adding points for minority applicants (as in *Gratz*) or creating a special admissions program for them (as in *Bakke*), those institutions could simply add an irrelevant admissions criterion that they believed minorities would do well in – say the 50-yard backstroke. Since that would be a "facially neutral" albeit racially-motivated criteria, and it would diminish the disparate impact resulting from the use of standardized admission tests (*see* 28 C.F.R. § 42.104(b)(2)), it would not even constitute intentional discrimination or violate the Equal Protection Clause (which requires intent, *Washington v. Davis*, 426 U.S. 229 (1976)).

The fact that the Second Circuit limits its idiosyncratic definition of "intentional discrimination" to situations where the employer is addressing the results of a selection device with disparate impact does not make it coherent. To the contrary. If an employer takes "facially neutral" acts to manipulate the racial results of an employment process in *any other context* -- if, for example, the selection device does not have disparate impact but the employer is still

dissatisfied with the racial results for public relations or other reasons -- then those "facially neutral" acts are deemed a form of intentional discrimination.

C. The Courts Below Misconstrued The Elements of "Intentional Discrimination"

The courts below misconstrued the "intent" requirement of the Equal Protection Clause and Title VII because they equated it with either (a) an express racial classification or (b) some kind of malevolent motivation against whites. Just after listing the defendants' various motives – including the goal of "diversity in the Fire Department" and avoiding "public criticism" – the district court held that "*[n]one* of the defendants' expressed motives could suggest to a reasonable juror that defendants acted 'because of' animus against non-minority firefighters who took the Lieutenant and Captain exams." *Ricci*, 554 F. Supp. 2d at 162 (emphasis added). This use of "animus" is contrary to the language of the statute, and the interpretation this Court has given that word in Title VII and other civil rights laws.

First, Section 703(a) does not require that an employer act "'because of' animus against" someone based upon race; it requires only that the employer have acted "because of" race. Animus has been used occasionally by this Court to describe a motivation that is the same as

intentional discrimination or disparate treatment. But it is not mentioned in the statute, and is certainly not an added requirement beyond what is explicitly required by Section 703(m).

In any event, the lower courts appear to be using "animus" as a synonym for hatred or dislike, and there is nothing in Title VII or Equal Protection jurisprudence, or that of other civil rights laws, that would support such a requirement. In *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 269-70 (1993), this Court held:

> We do not think that the "animus" requirement [in Section 1985(3)] can be met only by maliciously motivated, as opposed to assertedly benign (though objectively invidious), discrimination against women. It does demand, however, at least a purpose that focuses upon women *by reason of their sex* – for example (to use an illustration of assertedly benign discrimination), the purpose of "saving" women *because they are women* from a combative, aggressive profession such as the practice of law. (emphasis in original)

Cf. Int'l Union, United Automobile, Aerospace & Agricultural Implement Workers Of America v. Johnson Controls, Inc., 499 U.S. 187, 199 (1991)

(policy of excluding women capable of becoming pregnant from jobs involving exposure to lead violated Title VII; "the absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect. Whether an employment practice involves disparate treatment through explicit facial discrimination does not depend on why the employer discriminates but rather on the explicit terms of the discrimination"); *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 668 (1987) (Section 1981 liability found against unions for failing to pursue claims of racial discrimination on the part of their members even though "there was no suggestion below that the [u]nions held any racial animus against or denigrated blacks generally"); *id.* at 669 (affirming lower court finding that a union is liable under Section 1981 "regardless of whether . . . its leaders were favorably disposed toward minorities"). *Cf. Bakke*, 438 U.S. at 307 (opinion of Powell, J.):

> If petitioner's purpose is to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin, such a preferential purpose must be rejected not as insubstantial but as facially invalid. Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids.

II. TITLE VII SHOULD NOT BE INTERPRETED TO PERMIT REMOTE POSSIBILITIES OF LIABILITY FOR DISPARATE IMPACT TO EXCUSE A VIOLATION OF ITS CORE PROVISION PRECLUDING DISPARATE TREATMENT

The primary purpose of Title VII is to prohibit intentional discrimination. The prohibition against "disparate impact" discrimination should not be used to excuse intentional discrimination.

Even in the initial case adopting the "disparate impact" paradigm, this Court made clear that a "[d]iscriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed." *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971). Thus, this Court has described the "disparate impact" prohibition as a prophylactic designed to attack Title VII's core concern, intentional discrimination. *E.g.*, *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 987 (1988) ("[T]he necessary premise of the disparate impact approach is that some employment practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination.").

This Court, and various of its Justices, has expressed concerns that an overly-permissive interpretation of the disparate impact model would

lead to "quotas," a form of intentional discrimination. *E.g.*, *id.* at 992 (plurality op.) ("We agree that the inevitable focus on statistics in disparate impact cases could put undue pressure on employers to adopt inappropriate prophylactic measures . . . . Congress has specifically provided that employers are *not* required to avoid 'disparate impact' as such." (emphasis in original) (*citing* 42 U.S.C. § 2000e-2(j))); *id.* at 993 (plurality op.) ("If quotas and preferential treatment become the only cost-effective means of avoiding expensive litigation and potentially catastrophic liability, such measures will be widely adopted. . . . Allowing the evolution of disparate impact analysis to lead to this result would be contrary to Congress' clearly expressed intent . . . ."); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 652 (1989) (permitting a prima facie case of disparate impact to be established based solely on a discrepancy between proportion of minorities in employer's two different job categories "cannot be squared . . . with the goals behind the statute. . . . The only practicable option for many employers would be to adopt racial quotas, insuring that no portion of their work forces deviated in racial composition from the other portions thereof; this is a result that Congress expressly rejected in drafting Title VII."); *id.* (permitting a prima facie case to be so established "would 'leave the employer little choice . . . but to engage in a subjective quota system of employment selection. This, of course, is far from the intent of Title VII.'" (*quoting Albemarle Paper Co. v. Moody*, 422 U.S.

405, 449 (1975) (Blackmun, J., concurring in judgment))). This Court's reluctance to allow the disparate impact theory of liability to undermine the ban on disparate treatment shows the superior place the latter prohibition has in the statute.

That prohibiting intentional discrimination is the core goal of Title VII can be seen further from various parts of its text. First, as the above-cited cases note, Section 703(j) makes clear that any prohibition on disparate impact does *not* require an employer to engage in racial balancing (which would, of course, be a form of disparate treatment). 42 U.S.C. § 2000e-2(j). The safe-harbor for professionally-developed, job-related exams (42 U.S.C. § 2000e-2(h)) further demonstrates that the Congress that passed Title VII was not trying to attack racial imbalance. Section 707(a) grants the Attorney General the right to bring a lawsuit against those who have committed a "pattern or practice" of conduct "*intended* to deny the full exercise of the rights herein described." 42 U.S.C. § 2000e-6(a) (emphasis added).

Provisions passed in the Civil Rights Act of 1991 further demonstrates this point. When Congress permitted plaintiffs to recover compensatory damages for discrimination, in the Civil Rights Act of 1991, it limited that remedy to instances of intentional discrimination. 42 U.S.C. § 1981a(1) (excluding "an employment practice that is unlawful because of its disparate impact"

from scope of the provision providing compensatory damages). Section 703(l) prohibits a particular kind of intentional discrimination – the adjustment of test results on the basis of race – that Congress feared was being used by some employers to remedy the disparate impact of such exams (and which is implicated in this case). 42 U.S.C. § 2000e-2(l). Finally, Section 703(m) creates liability whenever a prohibited consideration is a "motivating factor" in an employment decision, even if the employer would have done precisely the same thing in the absence of the improper factor. 42 U.S.C. §§ 2000e-2(m), 2000e-5(g)(2)(B).

Not only does Title VII's text clearly set its primary goal as eliminating intentional discrimination, but it also sets the elimination of intentional *racial* discrimination as the highest priority. Thus, while "business necessity" can provide a defense to a claim of disparate impact discrimination (but *not* intentional discrimination, *see* Section 703(k)(2)), and a "bona fide occupational qualification" showing can provide a defense to intentional sex, religion, or national origin discrimination (Section 703(e)(1)), *neither* of those defenses is available in a case of intentional racial discrimination.

Given the primacy of the prohibition against intentional employment discrimination in Title VII, the defense that an employer was trying to avoid disparate impact liability must be confined

so that it does not erode the statute's central purpose – much less the central purpose of other statutes, like 42 U.S.C. § 1981, which prohibit only intentional discrimination. In this regard, the motivation of "avoiding disparate impact liability" cannot be viewed as just another "non-discriminatory" motive for the refusal to hire, with the absence of evidence for the non-discriminatory motive going solely to its credibility and not to its legal sufficiency, when (as is true here) "avoiding liability" is inextricably bound with the race of the applicants.

Thus, even if "avoiding disparate impact liability" were the sole motivation for defendants' decision here – and, as shown in Part I, the courts below found a variety of different motives having nothing to do with avoiding liability – it would not be sufficient for defendants simply to show that they had a good faith belief that they *might* be sued, or even that they *might* be liable. To prevent such a defense from eroding Title VII's core prohibition against intentional discrimination, defendants should be required to show a strong evidentiary basis for such a belief, much as they have to do under the Equal Protection Clause.

An analogy can be drawn to race-conscious affirmative action plans, with which an "avoiding liability" defense has much in common. *United Steelworkers of America v. Weber*, 443 U.S. 193, 209 n.9 (1979) (Court declines to reach company and union's alternative argument that "their plan

was justified because they feared that black employees would bring suit under Title VII if they did not adopt an affirmative action plan"). In *Johnson v. Transp. Agency, Santa Clara Cty.*, 480 U.S. 616 (1987), this Court placed the adoption of a sex-conscious affirmative action plan within the *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973) burden-shifting framework. *Johnson*, 480 U.S. at 626-27. Thus, upon a plaintiff's establishing a prima facie case that a prohibited factor was taken in to account in an employment decision, "the burden shifts to the employer to articulate a nondiscriminatory rationale for its decision. The existence of an affirmative action plan provides such a rationale." *Id.* at 626.[4]

Yet, despite the reference to the *McDonnell-*

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[4] This Court's adoption of the *McDonnell-Douglas* framework in *Johnson*, and specifically its characterization of race-conscious or sex-conscious affirmative action plans as "nondiscriminatory rationales" in that framework, has led to some logical difficulties. Although this Court has held that *McDonnell-Douglas* is inapplicable in cases in which there is direct evidence of discrimination, courts have nonetheless deemed "affirmative action" plans to constitute direct evidence of discrimination. *See Bass v. Bd. Of County Commissioner, Orange County*, 256 F.3d 1095, 1111 n.7 (11th Cir. 2001) (rejecting argument that *Johnson* requires affirmative action plans to be considered only as circumstantial evidence of discrimination, and treating such plans as "direct evidence" of discrimination if invalid). For this reason, *amici* believe that the characterization of a race-conscious or sex-conscious affirmative action plan as a "nondiscriminatory rationale" was mistaken.

Douglas framework, no lower courts have adopted the position that the employer need only show a good-faith belief that it had adopted a valid affirmative action plan (regardless of whether it meets the evidentiary requirements in *Johnson*). To the contrary, in determining whether the "employer's justification is pretextual and the plan is invalid," *Johnson*, 480 U.S. at 626, courts will look at whether the evidence shows a "manifest imbalance" in the job category in question, and no such "manifest imbalance" can be found where, for example, the employer "simply calculated imbalances in all categories according to the proportion of women in the area labor pool, and then directed that hiring be governed solely by those figures." *Id.* at 636. *See Hill v. Ross*, 183 F.3d 586, 590 (7th Cir. 1999) ("Employers may not shed their responsibilities under Title VII . . . by intoning affirmative action."); *Maitland v. University of Minnesota*, 155 F.3d 1013, 1017 (8th Cir. 1999) (dispute of fact over whether salary regression study allegedly showing disparity in women faculty's salaries properly considered important variables precluded summary judgment on male faculty member's Title VII challenge to university's distribution of three million dollars in salary increases to a class of women); *Smith v. Virginia Commonwealth University*, 84 F.3d 672, 676-77 (4th Cir. 1996) (similar); *Hammond v. Barry*, 826 F.2d 73, 78 (D.C. Cir. 1987) (rejecting affirmative action plan for D.C. Fire Department based upon the demographics of the District only where Fire Department hired firefighters from

surrounding suburbs as well); *Janowiak v. Corporate City of South Bend*, 836 F.2d 1034, 1039-40 (7th Cir. 1987) (rejecting affirmative action plan for firefighters and police in South Bend that was based on general population statistics instead of the relevant labor pool). Similarly, courts must examine, as a factual matter, whether the manifest imbalance occurred in a "traditionally segregated job categor[y]" (*Johnson*, 480 U.S. at 632) and whether the plan "trammel[s] the rights" of those not benefitting from the plan (*id.* at 637).

Any "avoiding disparate impact liability" defense recognized here should be similarly limited. That is, to be deemed a "non-discriminatory rationale," there must be more than just an employer's good-faith belief that liability is possible, but strong evidence that it is so. Specifically, there should be evidence that there is a statistical disparity caused by an identifiable employer practice that is likely not defensible as job-related. Anything less would erode Title VII's core prohibition against intentional discrimination.

III. DEFENDANTS' CLAIM THAT THEY WERE CONCERNED ABOUT LIABILITY UNDER SECTION 703(K)'S "ALTERNATIVE EMPLOYMENT PRACTICE" PROVISION LACKS CREDIBILITY GIVEN THE LIMITS OF THAT SECTION

Defendants claim that they were concerned about possible lawsuits claiming that some unknown alternative employment practice rendered them liable under Title VII. This claim lacks credibility given the limited nature of the relevant provision under Section 703(k).

Section 703(k)(1)(A)(ii) states:

> An unlawful employment practice based on disparate impact is established under this subchapter *only if* - . . .
>
> (ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice *and the respondent refuses to adopt such alternative employment practice*.

42 U.S.C. § 2000e-2(k)(1)(A)(ii) (emphasis added).[5]

Plaintiffs attempting to prove a claim of discrimination through this method must show that there was an alternative selection device that was equally effective in terms of costs and other burdens in meeting the employer's legitimate business goals. *Watson*, 487 U.S. at 998 (O'Connor, J., concurring). Thus, under Section 703(k)(1), an employer is not liable for failing to adopt an alternative employment practice *unless and until* (1) the alternative practice has been proven to be one that is equally effective in meeting the employer's legitimate business goals *and* (2) the employer, *after having been presented*

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[5] Subparagraph C, to which subparagraph A(ii) refers, states that the demonstration alluded to in A(ii) "shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of 'alternative employment practice.'" 42 U.S.C. § 2000e-2(k)(1)(C). Although *Wards Cove Packing* was decided on June 5, 1989, its two paragraphs on the topic of alternative employment practices (*Wards Cove*, 490 U.S. at 660-61) did not purport to change the law that existed the day before on "alternative employment practices" – indeed, what it had to say on the subject was likely *dicta*, since the holding of the case was that the petitioners had not demonstrated a *prima facie* case of disparate impact. *Id.* at 650-53. Accordingly, it is unclear what meaning should be attributed to these opaque and self-referencing provisions. In any event, as shown in the text, the key provision for purposes here is separate from the showing needed to demonstrate that an alternative employment practice meets the requirements of subparagraph C.

with this evidence, refuses to adopt the alternative employment practice.

What this means, of course, is that, in the usual case, the remedy against an employer for violating Section 703(k)(1)(A)(ii) will be injunctive relief. While it is possible that the "equal effectiveness" showing was made years earlier, chances are that it is not made until trial. (That certainly would have been the case for any hypothetical challenge to the promotion procedures here.) An employer cannot "refuse to adopt" an equally effective practice until after it has been demonstrated to be "equally effective." And an employer cannot be held liable for damages or other compensatory remedies for conduct it engaged in *prior to* the conduct (here, the refusal to adopt) that rendered it liable.

Moreover, courts must take into account an employer's legitimate need for *timely* appointments to needed positions. An alternative employment practice was not "equally effective" for appointments made *in the past* if it would have taken another year or more to implement when compared to the selection device that the employer was ready to use. Given the care with which New Haven developed the civil service tests in question, detailed in the firefighters' brief, that certainly would have been the case here.

For these reasons, the provisions of Section 703(k)(1) can be used to enjoin employers from

using certain practices in the future, but can almost never be used to impose liability for appointments made in the past. It could not have been used to impose liability for appointment of the firefighters in accordance with Connecticut civil service law. Thus, the defendants' claim that they could have been liable under Section 703(k)(1) had they promoted the firefighters in accordance with Connecticut civil service law lacks credibility.

IV. THE EXISTENCE OF SELECTION DEVICES WITH DISPARATE IMPACT IS NOT, BY ITSELF, A COMPELLING GOVERNMENTAL INTEREST SUFFICIENT TO JUSTIFY THE USE OF RACE

Finally, with respect to the Equal Protection Clause, all race-conscious decision-making is subject to strict scrutiny, requiring the use of narrowly-tailored means to achieve a compelling governmental interest. The mere existence of a selection device with disparate impact does not create a compelling governmental interest sufficient to invoke racial decision-making.

This Court has said that the use of racial preferences should be limited to extreme cases where they are needed to break down long-term policies of exclusion. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509 (1989) ("In the extreme case, some form of narrowly tailored racial preference might be necessary to break down

patterns of *deliberate exclusion.*" (emphasis added)). Although this Court in *Croson* noted that the evidence before the City of Richmond did not even constitute a *prima facie* case of a statutory or constitutional violation (*id.* at 500), it never held that evidence that did constitute a "*prima facie* case" would be sufficient, by itself, to constitute a compelling governmental interest. (If this Court had said that the evidence before the City of Richmond did not even constitute "flimsy evidence" of discrimination, it would hardly follow that flimsy evidence was sufficient to constitute a compelling governmental interest.)

Indeed, if the existence of selection criteria with disparate impact were sufficient, it seemed fairly clear that the various capital and other requirements of the City of Richmond's contracting program likely met that standard. *Id.* at 507 ("Many of the barriers to minority participation in the construction industry relied upon by the city to justify a racial classification appear to be race neutral.").

Selection devices with disparate impact are pervasive in our society. Requiring Chinese translators to be fluent in Chinese probably has a disparate impact against groups other than Chinese-Americans. If that were all that were required to constitute a compelling state interest, a state employer could provide preferences to whites, blacks, and Hispanics. Similarly, if a public school requires its teachers to have a certain college

degree, and that requirement eliminates more minorities than whites, the public school could engage in race-conscious hiring favoring the disparately-impacted minorities. In short, racial preferences, rather than being rare and limited in scope, would be pervasive.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be reversed.

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Supreme Court, U.S.
FILED
FEB 2 6 2009
OFFICE OF THE CLERK

(11) (9)

NOS. 07-1428, 08-328

In The

Supreme Court of the United States

FRANK RICCI, ET AL.,

Petitioners,

v.

JOHN DESTEFANO, KAREN DUBOIS-WALTON, THOMAS UDE, JR., TINA BURGETT, BOISE KIMBER, MALCOLM WEBER, ZELMA TIRADO AND CITY OF NEW HAVEN,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

Brief of *Amicus Curiae* The Claremont Institute
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QUESTION PRESENTED

1. Whether a municipality's decision to alter its merit-based promotion procedures for employment in an emergency responder unit, after a merit-based promotion exam had already been administered, in order to achieve a certain racial outcome violates the equality of opportunity principles of the Fourteenth Amendment's Equal Protection Clause?

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INTEREST OF *AMICUS CURIAE*[1]

The Claremont Institute for the Study of Statesmanship and Political Philosophy is a non-profit educational foundation whose stated mission is to "restore the principles of the American Founding to their rightful and preeminent authority in our national life," including the principle, at issue in this case, that the self-evident truth of human equality, articulated in the Declaration of Independence and codified in the Fourteenth Amendment, does not allow government to adopt race-based preferences in employment. The Institute pursues its mission through academic research, publications, scholarly conferences and, via its Center for Constitutional Jurisprudence, the selective appearance as *amicus curiae* in cases of constitutional significance.

The Claremont Institute Center for Constitutional Jurisprudence has participated as *amicus curiae* before this Court in several other cases of constitutional import, including *Elk Grove Unified School District v. Newdow*, No. 02-1624; *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001); *Boy Scouts of America* v. *Dale*, 530 U.S. 640 (2000); and *United States v. Morrison*, 529 U.S. 598 (2000).

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[1] The Claremont Institute Center for Constitutional Jurisprudence files this brief with the consent of all parties. The letters granting consent have been filed previously. Counsel for a party did not author this brief in whole or in part. No person or entity, other than *amicus curiae*, its members, or its counsel made a monetary contribution specifically for the preparation or submission of this brief.

INTRODUCTION

This nation was founded on the affirmative premise that "all men are created equal." THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). This principle is, in Abraham Lincoln's words, a "great truth, applicable to all men at all times." Letter from Abraham Lincoln to H.L. Pierce (Apr. 6, 1859), *in* 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN 374, 376 (R. Basler ed., 1953).

Vindication of the principle of equality, and the corollary proposition of unalienable human rights, came at great cost. Winning the War for Independence was just the beginning. As Mercy Otis Warren observed, it was important that "judicious men" were "jealous of each ambiguity in law or government" so as not to "render ineffectual the sacrifices they had made for . . . the transmission of the enjoyment of the equal rights of man to their latest posterity." MERCY OTIS WARREN, HISTORY OF THE RISE, PROGRESS AND TERMINATION OF THE AMERICAN REVOLUTION 658 (L. H. Cohen ed., 1988) (1805). She noted that the "present representative government may stand for ages . . . if the equalization of liberty, and the equity and energy of law . . . [is] cherished." *Id.* at 696.

Our nation's founders regularly exhibited an understanding of equality that is strikingly similar to what we today refer to as equality of opportunity, not equality of result. Indeed, James Madison described the "protection of different and unequal faculties" as "the first object of government." THE

FEDERALIST NO. 10, at 78 (C. Rossiter ed. 1961). James Wilson added that:

> [w]hen we say all men are equal, we mean not to apply this equality to their virtues, their talents, their dispositions, or their acquirements. . . but however great the variety and inequality of men may be with regard to virtue, talents, taste, and acquirements; there is still one aspect in which all men in society, previous to civil government are equal. With regard to all, there is an equality in rights and obligations . . . In such a state, no one can claim, in preference to another, superiour right . . . .

James Wilson, Of Man as a Member of Society, Lectures, on Law (1791), *in* 1 THE FOUNDERS' CONSTITUTION, at 555-56 (P. Kurland & R. Lerner eds., 1987). Alexander Hamilton agreed, writing that "[t]here are strong minds in every walk of life that will rise superior to the disadvantages of situation, and will command the tribute due to their merit, not only from the classes to which they particularly belong, but from the society in general. *The door ought to be equally open to all.*" THE FEDERALIST NO. 36, at 217 (C. Rossiter ed. 1961) (emphasis added).

These sentiments were codified in the first State constitutions established after the American colonies declared their independence. The Virginia Declaration of Rights, for example, provided that "all men are by nature equally free and independent." VA. DECLARATION OF RIGHTS, § 1 (1776). And the

Massachusetts Declaration of Rights stated simply, "All men are born free and equal[.]" MASS. DECLARATION OF RIGHTS, § 1 (1780). Pennsylvania declared: "all men are born equally free and independent, and have certain natural, inherent and inalienable rights, amongst which are, the enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety." PA. DECLARATION OF RIGHTS, § 1 (1776).

Of course, the promise of equality early on confronted the reality of slavery, and the Constitution had to compromise with that insidious institution in order to maintain and strengthen a Union where slavery itself could be put on the course of ultimate extinction. As Thomas Cooley noted a century later, ratification of the Constitution would perhaps have been impossible "had it not been believed by many people in all sections that the institution could have but a temporary existence and must before many years be wholly done away with." THOMAS COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA, at 214 (American Foundation Publications 2001) (1880). The equality that the founders all hoped for, once slavery was done away with, was an equality of opportunity which judged each individual according to his own merit. Simeon Baldwin, one-time mayor of New Haven, son-in-law of Roger Sherman and future member of Congress, expressed the common sentiment well in a Fourth of July oration in 1788. Noting that slavery was a vice to be abolished, Baldwin exhorted his countrymen to

"make merit the passport to honour," thus "giv[ing] occasion for posterity to celebrate the day, that gave birth to this nation . . . ." Simeon Baldwin's Oration at New Haven, July 4, 1788, *in* 2 THE DEBATE ON THE CONSTITUTION, at 525 (B. Bailyn ed., 1993).

Slavery in the southern states persisted longer than many Founders had hoped despite efforts to curtail and eliminate it. One of the most forceful social and moral challenges to slavery came from escaped slave Frederick Douglass. He asked "whether the American people have loyalty enough, honor enough, patriotism enough, to live up to their own Constitution." WILLIAM S. MCFEELY, FREDERICK DOUGLASS 371 (1991). Douglass declared that "[n]o nation was ever called to the contemplation of a destiny more important and solemn than ours" and he worked for an America that offered "justice for all men, justice now, and always, justice *without reservation or qualification* except those suggested by mercy and love." WILLIAM BENNETT AND JOHN T.E. CRIBB, THE AMERICAN PATRIOT ALMANAC 41 (2008).

The stain of slavery was removed by the Civil War. To be sure, the North's stated goal at the start was to preserve the Union. However, as the scope of the war broadened, President Abraham Lincoln was able to draw on his constitutional powers as Commander in Chief to expand the purpose of the war to include abolition of slavery in the confederate states, thereby reconciling the promise of the Declaration of Independence with the workings of the Constitution. *See* HARRY JAFFA, A NEW BIRTH OF FREEDOM: ABRAHAM LINCOLN AND THE COMING OF THE CIVIL WAR (2000); HARRY JAFFA, CRISIS OF THE

HOUSE DIVIDED: AN INTERPRETATION OF THE ISSUES IN THE LINCOLN-DOUGLAS DEBATES (1959). In the Gettysburg Address, Lincoln justified the carnage of the battle with the prospect of preserving the "new nation," created by "our fathers," that was "conceived in Liberty, and dedicated to the proposition that all men are created equal." Abraham Lincoln, Address at Gettysburg, Pennsylvania, Nov. 19, 1863, *in* ABRAHAM LINCOLN, SPEECHES AND WRITINGS, 1859-1865, at 536 (D. Fehrenbacher ed., 1989). Lincoln called on "us the living" to dedicate themselves "to the great task remaining before us," to ensure "that this nation, under God, shall have a new birth of freedom," and "that government of the people, by the people, for the people, shall not perish from the earth." *Id.* Restoring the Union thus stood for two propositions, the working of popular democracy consistent with, and as a means to advance, freedom and equality for all men.

The Fourteenth Amendment's guarantee of equal protection of the laws to all citizens, regardless of race, was the fulfillment of the Declaration of Independence's promise and the Civil War's sacrifice. It specifically prohibits the states from classifying and treating citizens differently on the basis of their skin color and ethnic heritage. No one disputes that this is exactly what the respondent has done here, and why the decision of the court below must be reversed.

ARGUMENT

I. Racial Preferences, Regardless of the Justification, That Are Not Tailored to Remedy Past Wrongs Are Always Discriminatory.

Toward the end of the Civil War, Frederick Douglass eloquently urged equal treatment before the law in simply stating, "what I declare for the Negro is not benevolence, not pity, not sympathy, but simply justice." Frederick Douglass, What The Black Man Wants (Jan. 26, 1865), *in* 4 THE FREDERICK DOUGLASS PAPERS 59, 68-69 (J. W. Blassingame & J. R. McKivigan eds., 1991). He continued:

> Everybody has asked the question . . . "What shall we do with the Negro?" I have had but one answer from the beginning. Do nothing with us! . . . . All I ask is, give him a chance to stand on his own legs! . . . . If you will only untie his hands, and give him a chance, I think he will live.

Id.

Douglass understood that paternalistic preferential programs are often justified as a way to correct past moral wrongs but in fact are premised on the notion that minorities are incapable of competing on a level playing field. Unfortunately, the results of such preferential discrimination have often been just as bad for the alleged beneficiaries as were the ills which gave rise to such programs. *See, e.g.*, THOMAS SOWELL, THE ECONOMICS AND POLITICS OF RACE 200 (1983) (illustrating "counterproductive

trends" caused by "beneficial" discrimination). "Preferential treatment does not teach skills, educate or instill motivation. It only passes out entitlement by color . . . ." SHELBY STEELE, THE CONTENT OF OUR CHARACTER 121 (St. Martin's Press 1990). Even apart from its ineffectiveness, a racial preference is morally wrong because it "treats the accidental feature of race as an essential feature of the human persona . . . [and thus] violates the principles of human nature." Edward J. Erler, *The Future of Civil Rights: Affirmative Action Redivivus*, 11 NOTRE DAME J.L. ETHICS & PUB. POL'Y 15, 49 n. 132 (1997).

These principals are not simply abstract political theory, but part and parcel of the principal of equality, articulated in the Declaration of Independence and codified in the Fourteenth Amendment's Equal Protection Clause. As Charles Sumner, one of the principle authors of that clause, wrote:

> [The principle of equality] is the national heart, the national soul, the national will, the national voice, which must inspire our interpretation of the Constitution and enter into and diffuse itself through all the national legislation. Such are the commanding authorities which constitute 'Life, Liberty and the Pursuit of Happiness,' and in more general words 'the Rights of human Nature,' without distinction of race . . . as the basis of our national institutions. They need no additional support.

Charles Sumner, The Barbarism of Slavery (1860), *reprinted in* AGAINST SLAVERY: AN ABOLITIONIST

READER 313, 320 (M. Lowance ed., 2000). This view of the Fourteenth Amendment's Equal Protection clause was embraced by Justice Harlan in his dissenting opinion in *Plessy v. Ferguson*, when he noted that "our Constitution is colorblind, and neither knows nor tolerates classes among its citizens." *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896). New Haven's race-balancing motivation for rejection of the results of its merit selection process flies in the face of that inspiring admonition, and it should be rejected. Indeed, the time is long overdue for government to cease treating individuals on the basis of their skin color rather than "the content of their character," and thereby to give full effect to the dream that Martin Luther King, Jr. espoused in 1963 on the steps of the Lincoln Memorial. Martin Luther King, Jr., "I have a Dream" (Aug. 28, 1963) *in* A CALL TO CONSCIENCE: THE LANDMARK SPEECHES OF MARTIN LUTHER KING, JR. at 81-87 (C. Carson & K. Shepard eds., 2001).

II. Strict Scrutiny Must Be Applied Whenever the Government Distributes Burdens or Benefits on the Basis of Racial Classifications.

This Court has consistently applied the strict scrutiny standard in cases involving racial classifications for the very reason that euphemisms like "racial balancing" are pretexts for the practice of racial preference for some and racial discrimination against others. *See, e.g., Johnson v. California*, 543 U.S. 499, 505-506 (2005); *Grutter v. Bollinger*, 539

U.S. 306, 326 (2003); *Adarand Contractors v. Pena*, 115 U.S. 200, 224 (1995). Just two years ago, this Court restated the caution that "racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification." *Parents Involved in Comty. Schs. v. Seattle Sch. Dist. No. 1*, 127 S.Ct. 2738, 2752 (2007) (quoting *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003)). Certainly the tenuous connection claimed by New Haven between a racially desired outcome and the fuzzy concern about disparate impact is anything but "exact."

A. The Strict Scrutiny Test Allows Government to Use Race in Employment and Related Contexts Only to Remedy Past Intentional Discrimination Based Upon Race.

In the school desegregation cases, this Court has considered the "'correction of past discrimination to be a compelling government interest [when] eliminat[ing] the discriminatory effects of the past as well as to bar like discrimination in the future.'" *Freeman v. Pitts*, 503 U.S. 467, 511 (1992) (quoting *Green v. County Sch. Bd. of New Kent County, VA*, 391 U.S. 430, 438 n. 4 (1968)). Such a narrow use of racial classifications has historical support. After the Civil War, for example, General William Sherman decreed that 400,000 acres of land along the fertile Georgia coast, confiscated from former slave-owners, should be set aside for the exclusive use of freed slaves. Each family was to receive 40 acres, from which comes the term 'forty acres and a

mule.' ALFRED BROPHY, REPARATIONS PRO & CON 25 (2006). Similarly, the United States government gave compensation to individual Japanese-Americans who were themselves interned during World War II because of their race and/or national origin. *Id.* at 30.

This Court's recognition of such a measured and time-limited response to identifiable past harm came with this admonition, however: "Past wrongs to the black race, wrongs committed by the State and in its name, are a stubborn fact of history. And stubborn facts of history linger and persist. But though we cannot escape our history, neither must we overstate its consequences in fixing legal responsibilities." *Freeman*, 503 U.S. at 496; *see also City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 492 (1989) (O'Connor, J., plurality opinion). Quite simply, Justice Scalia was correct when he noted: "Individuals who have been wronged by unlawful racial discrimination should be made whole; but under our Constitution there can be no such thing as either a creditor or a debtor race. That concept is alien to the Constitution's focus on the individual." *Adarand Contractors v. Pena*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring in part and concurring in the judgment).

In the present case, the City of New Haven has conceded that its use of racial categories is not necessary to remedy past racial discrimination. The respondents presented no evidence, nor did the trial court make any factual findings, that the New Haven fire department had a history of racial discrimination. Pet.App. 938a-945a, 1013a-1037a.

Rather, the record suggests that in recent years the City has gone to great lengths to *accommodate* minorities, even in the face of stern rebukes from state courts for repeatedly attempting to circumvent its own merit-based hiring policies. *See, e.g., Kelly v. City of New Haven*, 881 A.2d 978, 1000-1004 (Conn. 2005); *Henry v. Civil Serv. Comm'n*, 2001 WL 862658, *1 (Conn. Super. July 3, 2001). Under such circumstances, the use of race to determine government promotions on a preferential basis (or deny them to others) is not remedial, but rank racial discrimination.

One other aspect of the respondent's claims is particularly pernicious. The City of New Haven argues, and the court below agreed, that states could engage in racial discrimination if it believed, in "good faith," it was doing so to comply with federal law – here, Title VII of the Civil Rights Act of 1964. Resp.'s Br. 12. This justification, if accepted by this Court, would open the door to racial discrimination in many areas of state government. But more importantly, it would defeat the very purpose of the Reconstruction Amendments. As this Court has made clear in other contexts, the federal government cannot compel the states to violate the Constitution. *See, e.g., South Dakota v. Dole*, 488 U.S. 203, 210 (1987). The federal government's powers cannot force states to violate the Equal Protection Clause of the Constitution, which also prohibits racial discrimination on the part of the federal government through the Fifth Amendment's Due Process Clause. *Bolling v. Sharpe*, 347 U.S. 497 (1954). This Court would immediately reject the proposition that the federal government

could compel the states to reinstitute slavery or to impose poll taxes on the basis of race. This Court should act no differently if the federal government's actions were read to force the states to discriminate in employment. It would defeat the core purpose of the Reconstruction Amendments if the federal government could order the states to violate the Fourteenth Amendment's principle of racial equality.

III. Although *Grutter* Allowed a Diversity Objective in University Settings, This Court Has Never Considered Non-Remedial Racial Preferences to be a Compelling Interest and Should Not Now Do So.

This Court held in *Grutter v. Bollinger*, 539 U.S. 306 (2004), that diversity in law school education is a compelling interest. *See also Parents Involved*, 127 S.Ct. at 2752-53. According to *Grutter*, the state may consider race in the context of evaluating applications for graduate school admission, but only if race is one of many factors and does not dictate the outcome. *Grutter*, 539 U.S. at 339. ("[T]he Law School sufficiently takes into account . . . a wide variety of characteristics besides race and ethnicity that contribute to a diverse student body").

Respondent does not contend that its purpose was to achieve diversity. But even if it did, *Grutter's* rationale cannot be stretched beyond higher education confines without gutting the core promise of the Equal Protection Clause. The compelling interest claimed by the state in *Grutter* was promoting a "multifaceted and unique learning

experience," which can only be achieved, so it was argued, by admitting students that come from different racial backgrounds. *Id.* at 316. (By enrolling a "'critical mass' of [underrepresented] minority students," the Law School seeks to "ensure their ability to make unique contributions . . . ."). If this is truly a sufficiently compelling governmental interest, it is one specifically tied to a particular learning environment; it should not be extended beyond the graduate educational context.

A. Unless Racial Selection Criteria Are Restricted to the University Setting, Race-Based Decisions Are Invited in Other Contexts.

"At the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class." *Miller v. Johnson*, 515 U.S. 900, 911 (1995).

Until *Grutter*, this Court had identified as a compelling state interest only the remedying of past discrimination and, in *Korematsu* itself, the most urgent of wartime national security claims. *See Korematsu v. U.S.*, 323 U.S. 214 (1944). The subsequent statutory repudiation of *Korematsu* demonstrates the caution with which one should indulge such claims, and this case, too, demonstrates the dangers of blurring the bright-lines of the Fourteenth Amendment. If diversity is a compelling interest sufficient to overcome strict scrutiny in the

context of graduate school education, states will argue that there is no principled difference in seeking diversity in its employment and operations. States may well claim, for example, that having an emergency responder workforce that mirrors the racial composition of the community is even more important than creating a desirable educational environment.

With such arguments, the clarity of the Fourteenth Amendment's anti-discrimination principle will be undermined. That principle is meant to keep states and the courts from making these kinds of distinctions rather than simply treating all individuals without regard to their skin color. *Grutter* should not become the first step down a dangerous path that circumvents the clear prohibition against racial discrimination expressed in the Equal Protection Clause.

Governing bodies, whether civic or educational institutions, have unfortunately tried to justify the use of racial classifications by asserting that they are benign, or in the case of *Grutter* – beneficial – yet, this Court has recognized the inherent risk in any mechanism for race-based selection. Whatever the given justification, variations of the practice are still "suspect, and that means that simple legislative assurances of good intention cannot suffice." *Croson*, 488 U.S. at 500. The strict scrutiny test serves to "ensure that courts will consistently give racial classifications a detailed examination, as to *both ends and means*." *Adarand*, 515 U.S. at 202 (emphasis added).

In short, applying *Croson's* and *Adarand's* three general propositions[2] for arbitration of questionable governmental racial classifications, "*any person, of whatever race*, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the *strictest* judicial scrutiny." *Adarand*, 515 U.S. at 223, 224 (emphasis added).

B. This Case Presents the Opportunity to Limit *Grutter* Only to a University's Graduate-Level Admissions Process.

There is no legal or logical basis to extend the *Grutter* justifications for racial bias beyond university classrooms and certainly not to a local fire department in New Haven, Connecticut. The diversity that *Grutter* promotes is not "racial diversity" but rather "a specific type of broad-based diversity" which only included race as a potential influence. *Parents Involved*, 127 S.Ct. at 2754. As this Court held in *Parents Involved*, this unique

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[2] First, skepticism: "Any preference based on racial or ethnic criteria must necessarily receive a most searching examination," Wygant v. Jackson Bd. of Ed., 476 U.S. 267, 273-274 (1986); second, consistency: "[T]he standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification," Croson, 488 U.S. at 494; and third, congruence: "Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment," Buckley v. Valeo, 424 U.S. 1, 93 (1976).

holistic analysis cannot be used to justify racial discrimination even in other areas of education. *Id.* If this Court was unwilling to allow the diversity justification to school assignments in primary and secondary education, it should not extend it beyond the confines of education to the very different area of government employment.

Allowing race-conscious employment policies will open the door to creative maneuvers to evade the Fourteenth Amendment such as occurred here. The merit-based promotion test was ignored because – and only because – of the racial makeup of the results. *Ricci v. DeStefano*, 554 F.Supp.2d 142, 145-51 (D.Conn. 2006).

The City's withdrawal of the test may have helped some candidates, but it also harmed others who had passed it – solely because of their skin color. The promotion scheme is not an attempt to increase "diversity" within the parameters allowed in *Grutter*. Rather, it is merely attempting to racially balance the fire department.[3] A test that was facially neutral was used in a discriminatory manner. It is to

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[3] *Grutter* would be more like this case if, in *Grutter*, admissions were based purely on LSAT score, and Michigan then withdrew reliance on the LSAT in order to admit more minorities. Yet a Court would not uphold that type of departure, because the Court in *Grutter* specifically noted that race in that context was only part of a holistic admissions process. The fire department promotion process appears to be non-holistic. Respondents attempted to find viable promotion candidates via an examination. That process failed to yield a racially diverse group, and so they attempted to explicitly use race—a measure not endorsed by the *Grutter* Court.

prevent this sort of discrimination that this Court has found it proper to apply strict scrutiny to all uses of race by the state. *Johnson v. California*, 543 U.S. 499, 505-506 (2005); *Parents Involved*, 127 S.Ct. at 1751.

New Haven has not identified any compelling interest that justifies refusing to promote otherwise qualified candidates, aside from simply stating that they desire more minorities in leadership positions than qualified for promotion by virtue of the exam's results. New Haven and cities that intend to practice similar employment and promotion processes are in need of a clear definition of government workplace equal treatment requirements.

IV. Merit-Based Promotion is Particularly Important in Public Safety Personnel Selection Even if Diversity is a Desired Feature in the Workforce.

This is an opportunity for this Court to make clear that "key limitations" on the diversity rationale cannot be "largely disregarded by the lower courts in extending *Grutter* to uphold race-discrimination in elementary and secondary schools" and by extension, government employment. *Parents Involved* 127 S.Ct. at 2753-54; *compare Hayden v. County of Nassau*, 180 F.3d 42, 49 (2d Cir. 1999) (holding that promoting minority police officers over more qualified white officers is not "automatically suspect"); *Kirkland v. N.Y. State Dep't. of Corr. Servs.*, 711 F.2d 1117 (2d Cir. 1983); *Bushey v. N.Y. State Civil Serv. Comm'n*, 733 F.2d 220 (2d Cir. 1984).

A. Public Safety Standards Require that Promotions in First Responder Occupations Be Awarded to the Most Qualified Candidates.

First responders, such as members of the New Haven Fire Department, respond to a myriad of different emergencies, including natural disasters, highway disasters, chemical emergencies, victim extrication, bombings, terrorist attacks and fire-related tragedies. For the safety and well-being of the victims of these emergencies, it is crucial that the first responders are capable of quickly and competently reacting to any type of disaster. First responders require a high level of expertise and knowledge within their field.

Fire department lieutenants and captains have a critical role in effective disaster response. Their tasks include responding to alarms, directing the routes to be taken to the fire, determining what types of equipment will be needed and the best methods for extinguishing fires, and supervising the work of other firefighters pending the arrival of a superior officer. Pet.App. 350a – 351a. Such supervision includes "entering burning buildings to direct their work, which may necessitate considerable physical exertion and potential hazard to health and safety." Pet.App. 363a – 365a. Often, they may be called upon to make life or death decisions. Pet.App. 167a: 186.

Mistakes by under-qualified firefighters can lead to devastating tragedies and loss of life, both for

members of the public and for other first responders. For example, in 1991, the New York Fire Department removed two firefighters from duty for retraining purposes and began disciplinary proceedings against four others after on-the-job mistakes led to the deaths of two men in Queens, New York. Joseph P. Fried, *City Cites Firefighters' Errors In Delay at Fatal Queens Blaze*, N.Y. TIMES, Jan. 19, 1991, § 1, at 33. The Department's Chief of Operations reported that the actions of one lieutenant "indicate[d] an unsatisfactory level of proficiency in basic engine company operations" and another lieutenant failed to "exercise command and control" over his unit. *Id.*[4]

In recognizing the importance of first responders to public safety, the City of New Haven established a strict merit-based promotion scheme to ensure the safety of the victims as well as the other firefighters. The New Haven Fire Department found it especially important to establish a merit-based promotion scheme because there was a prior history of entry-

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[4] Likewise, in January 2005, two New York firefighters died and six were forced to jump out of a fourth story building due to other firefighters' mistakes, communication failures and unfamiliarity with new equipment. Kareem Fahim, *Firefighting Mistakes Cited in a Report on Three Deaths*, N.Y. TIMES, Sept. 14, 2005, at B2. A report on the incident recommended that improved evacuation training, better discipline, and better preparation to deal with the water loss could have changed the outcome of the rescue. *Id. See also,* Annie Linskey, *Safety Lapses in Fire Death; Coordination Failed in Firefighter's Death in Burning House in October, Report Says*, THE BALTIMORE SUN, Apr. 28, 2007, at 1A. (Careless mistakes and safety violations by Baltimore firefighters contributed to the death of one of their own in 2006).

level hiring of firefighters based on political patronage and nepotism. Pet.App. 124a: 32. In fact, Congresswoman Rosa L. DeLauro's niece was hired by the New Haven Fire Department even though she never completed the Academy and her training was extended six weeks to help her pass. Pet.App. 125a: 38. In order to avoid situations such as these in the future, the Department found that it was best to use a merit-based promotional scheme.

B. The New Haven Tests Were Designed to Identify the Most Qualified Candidates.

In formulating the promotional exams for both the Lieutenant and Captain positions, Industrial/Organizational Solutions, Inc. (IOS) went to great lengths to insure the exam tested essential job-related skills. *See* Pet.App. 150a – 165a. These included knowledge of New Haven Fire Service rules and regulations, fire department management, general principles of firefighting, life and death decision-making, and command and control at a fire. Pet.App. 353a – 371a.

IOS also attempted to "gain maximum diversity" by including minorities in several stages of the examination process. One hundred percent of the department's minority captains and 84 percent of minority lieutenants were interviewed in the preliminary process of formulating the examination questions. Pet.App. 153a: 131. In addition, minorities represented 66 percent of the panelists asked to deliver the oral portion of the examination, far

exceeding their representation within the Department. Pet.App. 165a: 173.

With the approval of City officials, IOS also invited a battalion chief from a different fire department of comparable size and demographics to conduct an external review of the examinations. Pet.App. 158a: 150-151; 159a: 153.

After the fact, a Fire Program Specialist for the United States Department of Homeland Secured looked "extensively at the Lieutenant's exam and a little less at the Captain's exam" and concluded that the candidates "should know that material" and stated that he was comfortable with the way the test was developed. Pet.App. 564a, 566a.

C. Compromising Test Standards To Receive Particular Race-Based Results Jeopardizes Public Safety.

Despite the clear public safety concerns involved, the New Haven Fire Department has a history of admitting under-qualified firefighter candidates to their training program and relaxing standards for these candidates in order to avoid failing them.[5]

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[5] For example, some academy instructors were told to give the candidates "gimme quizzes" in order to raise failing recruits' scores. Pet.App. 142a: 92. Indeed, Petitioners contend that the New Haven Fire Academy is the only one in the country where a candidate can graduate without passing the national consensus standard of Firefighter I training. *Id.* Another failing recruit was allowed to continue in the Fire Academy despite an instructor's warnings that the recruit's inability to carry a ladder or other necessary equipment had caused injuries and

Allowing the City of New Haven to compromise essential job-related test standards for high-level fire department promotions in the name of diversity will only further jeopardize public safety.

Several Circuit Courts have recognized that hiring standards should not be compromised to increase minority representation in occupations involving public safety. In *Spurlock v. United Airlines*, for example, the Tenth Circuit rejected a black plaintiff's assertions that United Airlines should be required to lower its hiring standards in order to increase the proportion of minority airline pilots. *Spurlock v. United Airlines*, 475 F.2d 216 (10th Cir. 1972). Rather, the Court observed that:

> [W]hen the job clearly requires a high degree of skill and the economic and human risks involved in hiring an unqualified applicant are great, the employer bears a correspondingly lighter burden to show that his employment criteria are job-related . . . [Here], the risks involved in hiring an unqualified applicant are staggering. The public interest clearly lies in having the most highly qualified persons available to pilot airliners. The courts, therefore, should proceed with great caution before requiring an employer to lower his pre-employment standards for such a job.
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> *Id.* at 219.

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posed a continuing safety hazard to others on the training ground. Pet.App. 143a: 96.

The Sixth Circuit later applied the *Spurlock* rationale in *Zamlen v. Cleveland*, holding that an examination given to firefighter applicants did not violate Title VII even though female applicants were disproportionately unsuccessful. *Zamlen v. Cleveland*, 906 F.2d 209 (6th Cir. 1990). In *Zamlen*, the plaintiffs argued that the physical portion of the test was designed in a way that favored traditional male strengths, such as speed and strength, while ignoring attributes such as stamina and endurance, in which females often excel. *Id.* at 217. Nonetheless, the Court upheld the legality of the examination, accepting that it tested important job-related skills and emphasizing the great risk to public safety that would result from hiring unqualified firefighters. *Id.*

While *Spurlock* and *Zalmen* dealt with claims of direct racial discrimination, their rationale can be applied to the City of New Haven's act of reverse racial discrimination in this case. The public has a legitimate interest in ensuring that those hired for occupations involving public safety possess the high standards of knowledge and competence required to avoid devastating tragedies. Courts should not allow an employer to circumvent established merit-based testing standards for the purpose of racial balancing.

Although promotions based in part on racial preferences in order to improve diversity in a police department were upheld in *Detroit Police v. Young*, that case is distinguishable from the present situation. *Detroit Police v. Young*, 608 F. 2d 671 (6th Cir. 1979). In *Detroit Police*, the court emphasized the importance of public confidence and cooperation to effective crime prevention and solution. The court

reasoned that a more diverse police force may encourage more minorities to come forward with information, and/or foster better relations with members of particular minority communities. *Id.* at 696. Unlike police officers, however, firefighters' interaction with members of the public are usually confined to responding to emergency situations. In those situations, diversity is much less important than capability. Victims trapped in a burning building do not stop to notice the skin color of their rescuers but rather rely fully on the firefighters' ability to safely extricate them and their loved ones from harm. Compromising test standards for high level firefighters in order to achieve race-based results will not improve public confidence but rather jeopardize public safety.

CONCLUSION

Nearly a half century ago, Martin Luther King, Jr., described from the steps of the Lincoln Memorial his dream that one day all Americans would be judged by the content of their character and not by the color of their skin. Just last month, our country's first African-American elected to the highest office in the land urged us to recover the true meaning of the principle of equality that was established at the founding of our nation. President Barack Obama, Inauguration Speech (Jan. 20, 2009), *available at* http://www.nytimes.com/2009/01/20/us/politics/20text-obama.html?pagewanted=1. ("The time has come to reaffirm . . that noble idea, passed on from generation to generation: the God-given promise that

all are equal, all are free, and all deserve a chance to pursue their full measure of happiness"). New Haven's race-based decision to reject a promotion exam is a major step backward in those aspirational goals, and should be rejected by this Court.

Respectfully submitted,

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(9) (7)

Nos. 07-1428 & 08-328

Supreme Court, U.S.
FILED
FEB 24 2009
OFFICE OF THE CLERK

In The

Supreme Court of the United States

FRANK RICCI, *et al.*,

Petitioners,

v.

JOHN DeSTEFANO, *et al.*,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Second Circuit

AMICUS BRIEF OF THE CONCERNED AMERICAN FIREFIGHTERS ASSOCIATION, PHILADELPHIA CHAPTER, IN SUPPORT OF PETITIONERS

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BRIEF *AMICUS CURIAE* OF THE CONCERNED AMERICAN FIREFIGHTERS ASSOCIATION, PHILADELPHIA CHAPTER, IN SUPPORT OF PETITIONERS.

Concerned American Firefighters Association, Philadelphia Chapter ("CAFFA – Philadelphia"), submits this brief as *amicus curiae* and respectfully requests that the United States Court of Appeals for the Second Circuit decision be reversed.

INTEREST OF *AMICUS*[1]

CAFFA – Philadelphia members are all firefighters in the City of Philadelphia. It has approximately nine-hundred members. As set forth on the organization's website (http://www.caffaphilly.com), the purpose of CAFFA – Philadelphia is the following:

> The object of this Club shall be to promote the social, educational, and civic interest of the Concerned American Fire Fighters Association and their families. And to act as a "watch dog" to protect the rights of all

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than CAFFA – Philadelphia, its members, or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief; petitioner and respondent have submitted letters of blanket consent to the Clerk of the Court.

American Fire Fighters regardless of race or gender.

Moreover, CAFFA – Philadelphia's policy objectives are described in the following way:

- Fair Hiring and Promotional Practices for ALL Firefighters & Paramedics.
- The Elimination of Race Based Quotas in the Fire Service.
- Rank Order Hiring and Promoting.
- Reduce the Weight of or Eliminate Oral Examinations completely.

Like the New Haven Fire Department, hiring and promotions in the City of Philadelphia Fire Department take place under civil-service rules and regulations. Because of its experience with problems of the political manipulation of race comparable to what appears in this case, CAFFA – Philadelphia fully endorses the remedy of color-blindness in civil-service promotions sought by petitioners. The Equal Protection Clause of the Fourteenth Amendment has clear application to the troubling use of race in this case, and CAFFA – Philadelphia maintains that the racial classification employed here is constitutionally impermissible.

SUMMARY OF ARGUMENT

CAFFA – Philadelphia contends that the New Haven Civil Service Board's ("CSB") refusal to certify

the results of promotional examinations for the positions of lieutenant and captain in the New Haven Fire Department is an unequivocal violation of the equal protection of the laws guaranteed by the Fourteenth Amendment.[2] (CAFFA – Philadelphia shall rely on the facts set forth in the brief of petitioners.)

The Fourteenth Amendment of the United States Constitution requires in relevant part that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws." Under this constitutional requirement, the United States Supreme Court has required that all racial classifications receive strict scrutiny. In this case, the District Court and the United States Court of Appeals for the Second Circuit declined to confront the fact that a racial classification was used by the CSB, and therefore its failure to apply strict scrutiny was manifestly in error.

As a result of this failure to acknowledge the use of race, the District Court granted and the Court of Appeals for the Second Circuit affirmed summary judgment dismissing all the claims of the parties who excelled on the promotional examinations, which were subsequently nullified by CSB for failure of the results to satisfy the appropriate racial composition for promotions. The District Court also failed to

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[2] CAFFA – Philadelphia does not advance any arguments in this brief involving Title VII, but it joins in the arguments of petitioner with respect to the issues presented under this statute.

recognize the political shenanigans underlying the manipulation of race in New Haven's civil-service system.

This Court's equal-protection jurisprudence has embraced a robust skepticism with respect to all racial classifications. CAFFA – Philadelphia maintains that this case provides the Court with another excellent opportunity to eradicate as constitutionally impermissible the use of race in the promotion of firefighters and to buttress the principle of equality before the law.

ARGUMENT

The municipal employer violated the Equal Protection Clause by nullifying the examination results because of race.

The questions presented under the Fourteenth Amendment's Equal Protection Clause were framed below with precision by Judge Jose Cabranes thus: "Does the Equal Protection Clause prohibit a municipal employer from discarding examination results on the ground that 'too many' applicants of one race received high scores and in the hope that a future test would yield more high-scoring applicants of other races? Does such a practice constitute an unconstitutional racial quota or set-aside?" *Ricci v. DeStefano*, 530 F.3d 88, 94 (CA2 2008) (Cabranes, J., dissenting). Contrary to the determinations of both of the lower courts in this case, the Equal Protection Clause, when

applied, does in fact prohibit the race-based nullification of the examination results by the CSB.

The decisional law in this area is very well established and not beclouded with ambiguity. In *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989), the Court unambiguously determined that *all* racial classifications used by government require strict scrutiny. That is, the governmental entity must proffer a compelling interest to support the use of any racial classification, and the means to effectuate that compelling interest must be narrowly tailored. *See also Adarand Constructors, Inc. v. Pena,* 515 U.S. 200, 224 (1995) ("any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny").

Moreover, under the highest level of scrutiny, the only rationale that will survive is the rectification of past racial discrimination. As Judge Cabranes succinctly noted: "*Croson* and *Adarand* establish that racial quotas are impermissible under the Constitution absent specific findings of past discriminations that are not in the record here." *Ricci*, 530 F.3d, at 98 (Cabranes, J., dissenting).

In this case, the promotional examinations, which were fairly administered and scored, had results that were rejected by the CSB *because of the race of the successful examinees*. The District Court in

this case concluded that "plaintiffs cannot show that defendants acted out of intentionally discriminatory purpose." *Ricci v. DeStefano*, 554 F.Supp.2d 142, 161 (D. Conn. 2006), *aff'd*, 530 F.3d 87 (CA2 2008). Despite the fact that it is impossible to discern any other purpose, the District Court continued:

> Rather, they acted based on the following concerns: That the test had a statistically adverse impact on African-Americans and Hispanic examinees; that promoting off of this list would undermine their goal of diversity in the Fire Department and would fail to develop managerial role models for aspiring firefighters; that it would subject the City to public criticism; and that it would likely subject the City to Title VII lawsuits from minority applicants that, for political reasons, the City did not want to defend.

Ricci, 554 F.Supp.2d, at 162. Even assuming the sincerity of these concerns, *nothing* in this list of motivations constitutionally justifies the use of race to disregard the results of the promotional examinations in this case.

Of particular relevance to this dispute is *Lomack v. City of Newark*, 463 F.3d 303 (CA3 2006), in which the race-based transfer and assignment policy in the City of Newark fire companies was successfully challenged under the Equal Protection Clause. The Third Circuit concluded that without evidence of past intentional discrimination by a governmental agency, the use of racial classifications does not satisfy strict

scrutiny and is therefore not permitted under the Equal Protection Clause.

The court properly acknowledged that a government has a compelling interest in limiting its own past discrimination. *United States v. Paradise*, 480 U.S. 149, 167 (1987). That was not at issue in *Lomack*, nor is it at issue in this case. Instead, the *Lomack* court was required to confront the diversity rationale advanced by the City of Newark to justify what can be characterized as the aesthetic use of an express racial classification. This argument was carefully analyzed and then emphatically rejected.

The court reasoned in a way directly relevant to the concern with diversity in the instant case. It considered the constitutional validity of the diversity rationale in the context of higher education established in *Grutter v. Bollinger*, 539 U.S. 306 (2003), and then distinguished that understanding from the very different context of firefighting:

> The "relevant difference" . . . between a law school and a fire department is their respective missions. The mission of a school is to educate students, "prepar[e] students for work and citizenship," and cultivate future leaders. The *Grutter* Court found, based on extensive testimony and other evidence, that a "critical mass" of diverse students was necessary for the University of Michigan Law School to effectively achieve the mission. But *Grutter* does not stand for the proposition that the educational benefits of diversity are

always a compelling interest, regardless of the context. Rather, it stands for the narrow premise that the educational benefits of diversity can be a compelling interest to an institution whose mission is to educate.

The Fire Department's mission is not to educate. Its mission is "the control, fighting and extinguishment of any conflagration which occurs within the city limits." Newark, N.J. General Ordinances v. I, tit. II, ch. 21, § 1.2 (2005). Accordingly, *Grutter*'s holding regarding a compelling interest in the educational benefits of diversity is unavailing here. And, we note, the City does not argue that diversity within individual fire companies is in any other way necessary, or even beneficial, to the Fire Department's mission of fighting fires, *i.e.*, that the Department has an operational need for diverse fire companies [footnote omitted], and we do not read the City's assertions of increased "camaraderie," "acceptance," and "tolerance" as making such an argument. Even if we were to liberally construe those assertions as an operational needs argument, however utterly no evidence supports it. *See Patrolmen's Benevolent Ass'n,* 310 F.3d at 52-53 (citations omitted) ("[C]ourts recognizing the [operational needs] defense have required the government actor to demonstrate that it is 'motivated by a truly powerful and worthy concern and that the racial measure . . . adopted is a plainly apt response to that concern.' The justification must be substantiated by objective evidence. . . .").

Lomack, 463 F.3d, at 309-310 (emphasis in original; certain internal citations omitted).

As suggested by this *Lomack* extract, a case for race-based hiring has been made successfully in some circuits with the "operational needs" argument in the discrete area of law enforcement. The *Lomack* court adverts to this argument:

> Courts have found such "operational needs" arguments to be persuasive in the law enforcement context. *See, e.g., Petit v. City of Chicago,* 352 F.3d 1111, 1114 (7th Cir. 2004) (finding a "compelling operational need for a diverse police department" in a "racially and ethnically divided major American city"); *Patrolmen's Benevolent Ass'n v. New York,* 310 F.3d 43, 52 (2d Cir. 2002) ("We have recognized that 'a law enforcement body's need to carry out its mission effectively, with a workforce that appears unbiased, is able to communicate with the public and is respected by the community it serves,' may constitute a compelling state interest.").

Lomack, 463 F.3d, at 310, n.8.

A firefighter's mission, however, is much different from that of a police officer in that the task is not the often intense involvement in the day-to-day affairs, criminal or otherwise, of a community generally but is concentrated on fighting fires. Whereas police officers embody the force of the law throughout the community, firefighters are assigned the critical but tightly focused responsibility of protecting the public

from fire. The race of the firefighter is an utter irrelevance under these circumstances. With respect to the indispensable general proposition of racial neutrality, one Member of this Court has piquantly said, "When we depart from this American principle [of racial neutrality] we play with fire and much more than the occasional [party to a lawsuit] burns." *Croson*, 488 U.S., at 527 (Scalia, J., concurring). The use of race in the promotion of firefighters is irresponsible in its sacrifice of professional competence to the political preoccupation with racial diversity. And it is irrelevant in the firefighting context. Indeed, much more than a party to a lawsuit will be put in jeopardy by such a cavalier approach.

Lomack is also illustrative of another problem that is lurking in the instant case – namely, the dangerous possibility of political manipulation of race that is available when constitutional clarity is absent. In *Lomack*, the court depicted the political background as follows:

> On July 1, 2002, Sharpe James, newly re-elected as Mayor of Newark, New Jersey, issued a "mandate" in his inaugural speech that, "improve morale," all single-raced fire companies in the Newark Fire Department would be eliminated. [Footnote omitted.] The racial composition of each of the 108 fire companies was thereafter examined, and dozens of firefighters were involuntarily transferred to different companies solely on the basis of their race. In January 2004,

> Mayor James announced that "[w]e have created a rainbow at each fire house" [citation omitted].

Lomack, 463 F.3d, at 305.

Like *Lomack*, this case has a disturbing political subtext. The Reverend Boise Kimber is described by the District Court as "a vocal African-American minister who . . . is a political supporter and vote-getter for Mayor DeStefano." Rev. Kimber and others urged that the results of the promotional examinations be rejected. They were a central part of an informal group "whose priority was increasing racial diversity in the ranks of the Fire Department." *Ricci*, 554 F.Supp.2d, at 150. With race available as a potent instrument to interfere with a race-neutral civil-service system, the inevitable result is unfairness to innocent parties who have demonstrated competence and are seeking, at considerable cost to themselves with respect to time and money, advancement in their jobs. It is this race-based inequity that the Equal Protection Clause is designed to vanquish.

To employ Judge Cabranes's formulation: this "case presents a straight forward question: May a municipal employer disregard the results of a qualifying examination, which was carefully constructed to ensure race-neutrality, on the ground that the results of that examination yielded too many qualified applicants of one race and not enough of another?" *Ricci*, 530 F.3d, at 93-94 (Cabranes, J., dissenting).

The two lower courts reached an erroneous answer to this question because the Court did not apply the rigorous scrutiny required for a patent racial classification. This failure to identify the unconstitutional use of race is at the heart of this case.

The remedy under the Equal Protection Clause in this matter is the simple remedy available for all racial discrimination: the cessation of racial discrimination. As the Court has trenchantly observed, "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race." *Parents Involved In Community Schools v. Seattle School District No. 1*, 127 S.Ct. 2738, 2768 (2007). The Court is presented here with an excellent opportunity to extirpate the use of race as a factor in all promotions in fire departments throughout the nation.

CONCLUSION

To vindicate the laudable objective, warranted by both text and history, of color-blindness under the Equal Protection Clause, the decision in this case ought to advance this proposition: To get beyond race in the context of civil-service promotions in fire departments, this Court must require that, as a matter of constitutional imperative, race is beyond the pale. The Fourteenth Amendment requires nothing less than this color-blindness. "In the eyes of government, we are just one race here. It is American." *Adarand*, 515 U.S., at 239 (Scalia, J., concurring).

For the foregoing reasons, CAFFA – Philadelphia requests that this Court reverse the decision of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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February 24, 2009

Supreme Court, U.S.
FILED
FEB 26 2009
OFFICE OF THE CLERK

Nos. 07-608, 08-328

IN THE
Supreme Court of the United States

FRANK RICCI, ET AL.,

Petitioners,

v.

JOHN DESTEPHANO, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF AMICUS CURIAE EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF PETITIONER

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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INTEREST OF AMICUS CURIAE[1]

Eagle Forum Education and Legal Defense Fund ("Eagle Forum ELDF") is an Illinois nonprofit corporation. For over twenty years it has defended principles of limited government, individual liberty, and moral virtue. To ensure the guarantees of individual liberty enshrined in our written Constitution, Eagle Forum ELDF advocates that the Constitution be interpreted according to its original meaning. Eagle Forum ELDF therefore has a strong interest in protecting the right of individuals to be free of state-sponsored racial discrimination, which is expressly prohibited under the Equal Protection Clause of the Fourteenth Amendment.

SUMMARY OF THE ARGUMENT

The court of appeals erred in granting summary judgment on both Petitioners' Equal Protection Clause and Title VII claims. Petitioners were in line to receive promotions based on a testing process implemented by the City of New Haven until Respondents made a decision to dispense with the test results based entirely upon Petitioners' racial identities. Such behavior is racial discrimination subject to Equal Protection Clause and Title VII scrutiny, and Respondents have offered no valid justification for such discrimination in this case.

The court of appeals' Equal Protection Clause analysis rested on the notion that racially-motivated decision-making is immune from the guarantees found in the Fourteenth

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[1] This brief is filed in accordance with the global consent letters filed by Petitioners and Respondent with this Court. Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for any party authored this brief in whole or in part, nor did any person or entity, other than *amicus*, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

Amendment if a state actor merely refuses to give anyone a benefit because of the race of those in line for that benefit. This holding cannot be squared with the text or history of the Fourteenth Amendment, or this Court's precedents. Each of those sources teach that the Equal Protection Clause absolutely prohibits any race-based decision making that disadvantages individuals based on their race.

The court of appeals' Title VII analysis was also flawed. By holding that any statistical disparity in test results falling below the EEOC's "four-fifths rule" created a prima facie case of disparate impact sufficient to justify voluntary race-based remedial action, the court of appeals undercut the express intent of Congress that disparate impact analysis should not encourage racial quotas or discourage the use of genuine professionally-developed, job-related employment tests. At the same time, it interpreted Title VII in a way that brought it into conflict with the clear dictates of the Fourteenth Amendment.

The facts of this case and the court of appeals' holding demonstrate the need to clarify the standards for establishing a disparate impact claim. The vague standards articulated by some courts have contributed to an atmosphere where employers feel they must choose between implementing racial quotas (either overtly or surreptitiously) or facing a costly disparate impact lawsuit. Respondents argue that this dilemma forced them to retroactively invalidate their professionally-developed test and refuse to promote anyone. Instead of embracing such a perverse result, this Court should clarify Title VII disparate impact analysis to bring it in line with Congress's expressed intention to prohibit racial quotas while encouraging and protecting genuine professionally-developed, job-related employment tests.

ARGUMENT

I. The Court of Appeals Erred In Failing To Subject Respondents' Actions To Strict Scrutiny Under The Equal Protection Clause.

The text, the original understanding, and this Court's precedents unequivocally demonstrate that individuals have a right not to have state actors classify them by race and then subject them to disadvantages because of their race. Petitioners were unquestionably disadvantaged in the promotion process solely because of their race. Nonetheless, the Court of Appeals held that no racial classification had been made, and thus did not subject Respondents' acts to any Equal Protection scrutiny. Pet. App. 45a-46a. This was based on the flawed view that it is constitutionally permissible to evaluate whether the successful candidates in a selection process are of a certain acceptable racial mix, and, if not, to refuse to hire or promote them. Because this holding allows the city to disadvantage certain individuals based entirely on their race—as Petitioners indisputably were here—it is inconsistent with the text and original understanding of the Equal Protection Clause, as well as the this Court's settled precedent.

A. The Court Of Appeals' Holding Is Inconsistent With The Plain Language Of The Equal Protection Clause.

The starting point for interpreting any constitutional provision is its text. *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997). The Equal Protection Clause of the Fourteenth Amendment provides: "No State shall ... deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. A straightforward reading of the Clause makes clear that it prohibits state governments from treating citizens differently based on their race, regardless of whether that racial discrimination is accomplished by overt

or surreptitious means. *See* John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1144 (1992); ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 82 (1990) ("The text itself demonstrates that the equality under law was the primary goal" of the Equal Protection Clause.).

This plain meaning is confirmed by the contemporaneous statements of the key drafters and advocates of the Equal Protection Clause who uniformly believed that it would abolish all distinctions based on race. *See, e.g.*, 3 Cong. Rec. 945 (1875) (Statement of Rep. John Lynch) ("The duty of the law-maker is to know no race ... except to prevent distinctions on any [such] grounds, so far as the law is concerned."); 2 Cong. Rec. 4083 (1874) (Statement of Sen. Daniel Pratt) ("[F]ree government demands the abolition of all distinctions" based on race); Cong. Globe, 42d Cong., 2d Sess. 3260 (May 9, 1872) (Statement of Sen. Edmunds) (calling it is a "slave doctrine" to believe that "color and race are reasons for distinctions among citizens"); *see also* HORACE EDGAR FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT 87 (1908, 1965) (discussing Senator Jacob Howard's characterization of the Fourteenth Amendment on the floor of the Senate as establishing equality before the law); Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 993 (1995) (concluding that the framers of the Equal Protection Clause understood it to mean that "legally enforceable civil rights are the same" for everyone without regard to race).

The text and history of the Equal Protection Clause, thus "leave[] no room for doubt that laws treating people differently because of their race are invalid." *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 96 n.1 (1990) (Scalia, J., dissenting). Because Respondents denied Petitioners of promotions that they would have received if they had been of

a different race, their actions must be subjected to strict scrutiny under the Equal Protection Clause.

B. The Court Of Appeals' Holding Is Inconsistent With This Court's Equal Protection Clause Precedents.

The court of appeals' refusal to subject Respondents' actions to Equal Protection scrutiny is also contrary to this Court's precedents. The Court has repeatedly emphasized that whenever any individual "is disadvantaged by the government because of his or her race, whatever that race may be," a constitutional injury has occurred, and the challenged government action must survive strict scrutiny. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 230 (1995); *see Hirabayashi v. United States*, 320 U.S. 81, 100 (1943) ("Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality."); *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (subjecting actions "rest[ing] solely upon distinctions drawn according to race" to "'the most rigid scrutiny'"); *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984) (holding that "all governmentally imposed discrimination" is barred by the Fourteenth Amendment); *Shaw v. Reno*, 509 U.S. 630, 642 (1993) (identifying the prevention of "States from purposefully discriminating between individuals on the basis of race" as the "central purpose" of the Fourteenth Amendment); *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 127 S. Ct. 2738, 2751 (2007) ("It is well established that when the government distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny.").

Although the court of appeals recognized that Petitioners were denied promotions that they would otherwise receive based solely on Respondents' racially-motivated decisions, it

inconsistently held that Respondents' actions were not subject to Equal Protection Clause scrutiny. Pet. App. 45a-47a. Because Respondents used "individual racial classifications" to "distribute[] burdens," *Parents Involved*, 127 S. Ct. at 2751, and caused each Petitioner to be "disadvantaged ... because of his or her race," *Adarand*, 515 U.S. at 230, their decision to bar all promotions because of the racial identities of the successful candidates must be subjected to strict scrutiny. *See Williams v. Consolidated City of Jacksonville*, 341 F.3d 1261, 1269 (11th Cir. 2003) (holding that "a decision not to create new positions ... based solely upon the race ... of the next eligible candidates" violates the Equal Protection Clause); *see also Dean v. City of Shreveport*, 438 F.3d 448 (5th Cir. 2006) (reversing dismissal of white firefighter applicants' equal protection claims where there was no constitutionally valid basis for city's refusal to hire); *Quinn v. City of Boston*, 325 F.3d 18 (1st Cir. 2003) (city violated Equal Protection Clause in refusing to hire top-scoring white candidates); *Dallas Fire Fighters Ass'n v. Dallas*, 150 F.3d 438 (5th Cir. 1998) (promotion of women and minorities over more qualified white male candidates violated Equal Protection Clause); *Maryland Troopers Ass'n v. Evans*, 993 F.2d 1072 (4th Cir. 1993) (Equal Protection Clause forbids racial quotas in police hiring and promotions). Because the court of appeals failed to do so, its decision should be reversed.

II. The Court Of Appeals Erred In Holding That Respondents' Discriminatory Acts Did Not Violate Title VII.

Although the court of appeals acknowledged that a jury could find that Respondents' actions were motivated by Petitioners' race, Pet. App. 24a-25a, it held that those actions were immune from Title VII liability because "a statistical showing of discrimination, and particularly a pass rate below the 'four-fifths rule,' is sufficient to make out a prima facie

case of discrimination [for hypothetical plaintiffs], and therefore sufficient to justify voluntary race-conscious remedies." Pet. App. 38a. This holding is contrary to the text of Title VII, and this Court's precedents, and should be rejected. Moreover, it is based on an interpretation of Title VII that would bring it into direct conflict with the plain language of the Equal Protection Clause. The confusion manifested by both the court of appeals and Respondents shows the need for clarification of Title VII's disparate impact provisions to prevent government encouragement and sanction of racial quotas that are plainly contrary to the intent of Congress and the text of Title VII.

A. The Court Of Appeals' Holding Is Contrary To The Text of Title VII And This Court's Precedents.

Nothing in the text of Title VII provides an immunity for race-conscious remedial action based solely on statistical disparities in the results of a job-related test. To the contrary, several provisions manifest a clear congressional intent to avoid such an interpretation, as it comes perilously close to endorsing and enabling pure racial quotas, which Congress "clearly and emphatically" rejected in 42 U.S.C. § 2000e-2(j). *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 993 (1988) (plurality).

Title VII states that employers may not "fail or refuse to hire" or otherwise discriminate against an individual in the "terms, conditions, or privileges of employment, because of such individual's race." 42 U.S.C. § 2000e-2(a)(1). Moreover, Congress inserted two separate provisions in Title VII specifically designed to protect genuinely job-related tests from manipulation to achieve racial quotas. First, subsection (h) states that it is not an unlawful employment practice "to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed,

intended or used to discriminate..." 42 U.S.C. § 2000e-2(h). Second, subsection (l) specifically seeks to protect such employment tests from any manipulation by prohibiting an employer from "adjust[ing] the scores of, us[ing] different cutoff scores for, or otherwise alter[ing] the results of, employment related tests on the basis of race..." 42 U.S.C. § 2000e-2(l). The court of appeals' ruling here would open the door to racial quotes through "voluntary compliance," despite Congress's expressed intent to avoid requiring racial quotas in subsection (j), and to enable and protect job-related employment tests from legal challenge or racial manipulation in subsections (h) and (l).

The *Watson* plurality warned against precisely such an interpretation of Title VII, which would encourage an employer to discuss its employment practices in "euphemistic terms," while being "careful to ensure that the quotas are met." *Watson*, 487 U.S. at 993. "Allowing the evolution of disparate impact analysis to lead to this result would be contrary to Congress' clearly expressed intent." *Id.*

Then-Justice Rehnquist's dissent from the denial of certiorari in *Bushey v. New York State Civil Service Comm'n*, 469 U.S. 1117 (1985) is also instructive – and prescient. The Second Circuit's opinion in *Bushey*, upon which the court of appeals relied heavily here, *see* Pet. App. 37a-40a, approved race-norming of employment test scores motivated by the fear of a potential disparate impact lawsuit based simply on the fact that the racial breakdown of the test results did not comply with the EEOC's "four-fifths rule."[2] 733 F.2d 220, 225-228 (2d Cir. 1984). Justice Rehnquist, in dissent from

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[2] Although the court of appeals acknowledges that the race-norming practice upheld in *Bushey* was subsequently prohibited in the 1991 amendments to Title VII, which added subsection (l), it persisted in giving *Bushey* precedential weight because it asserted that "the 1991 amendments do not affect the reasoning and holding" of *Bushey*. Pet. App. 38a-39a n. 9.

the denial of certiorari, addressed the Second Circuit's "voluntary compliance" rationale, noting how quickly it could collapse into outright racial quotas and discrimination against certain candidates:

> Although voluntary compliance is a laudable goal, Members of this Court have recognized on other occasions that "affirmative action" plans must be policed to prevent the practice of discrimination for discrimination's sake, and to protect the interests of innocent third parties. These interests will not be sufficiently protected if agencies charged with discrimination may simply cave in to the allegations without even considering justifications for, or attempting to justify, their original employment decisions, particularly where the allegations are based only upon disparate impact.

Bushey, 469 U.S. at 1120-21 (internal citations omitted).

Chief Justice Rehnquist's warning appears especially prescient in light of the court of appeals' dismissal here of the subsection (h) safe-harbor for professionally-developed, job-related employment tests. Instead of requiring Respondents to give serious consideration to whether their test fell within that safe harbor, the court of appeals simply dismissed the safe harbor as providing a potential "defense" to a disparate impact claim. Pet. App. 29a-30a. It does not appear that the court of appeals required any good faith belief that this "defense" would be unavailing. Instead, despite Congress's clear intent to protect the integrity of such tests, the court of appeals granted permission to disregard them based solely on a desire to achieve a racial balance more satisfying to one group of potential plaintiffs, regardless of the effect on other candidates.

The court of appeals' decision therefore sanctions, and indeed encourages, precisely the type of "inappropriate prophylactic measures" that the *Watson* plurality was attempting to avoid, 487 U.S. at 992, which Chief Justice Rehnquist warned against, and which Congress specifically repudiated in subsections (h), (j), and (l). Its decision not only conflicts with the plain language of the statute, but would render the statute unconstitutional in the face of the Fourteenth Amendment's unambiguous guarantee of "*equal* protection." Such an interpretation should not stand and the court of appeals' decision should be reversed. As this Court recently observed, "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race." *Parents Involved*, 127 S. Ct. at 2768.

B. The Court Of Appeals' Decision Would Promote The Use Of Prohibited Racial Quotas.

At bottom, this case provides both a prime example of Title VII disparate impact analysis run amuck, and an opportunity to clarify the law to allow employers to hire the most qualified candidates. Such a clarification is especially needed in the context of the public employment of emergency first responders—such as the firefighters denied promotion here—where it is within the urgent public interest to ensure that each position is filled with the best individual for the job.

The need for clarification is clear from this case,[3] as well as the seemingly interminable litigation in other large cities whenever a fire or police department attempts to fill vacant positions. *See, e.g., Kohlbek v. City of Omaha*, 447 F.3d 552

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[3] Although Petitioners raise legitimate questions about whether Respondents actually have a good faith belief that validating the test in this case would subject them to Title VII liability, we assume *arguendo* that Respondents' asserted concern, relied upon by the court of appeals, *see, e.g.*, Pet. App. 25a-26a, is genuine.

(8th Cir. 2006) (suit challenging fire department promotions); *Banos v. City of Chicago*, 398 F.3d 889 (7th Cir. 2005) (suit challenging police promotions); *Biondo v. City of Chicago*, 382 F.3d 680 (7th Cir. 2004) (suit challenging fire department promotions); *see also Williams*, 341 F.3d at 1269 (suit challenging fire department decision not to create new positions). This fear of endless litigation imposes an enormous tax on public safety agencies, and in many instances prevents them from filling necessary positions. *See also* James M. Conway, *Title VII and Competitive Testing*, 15 HOFSTRA L. REV. 299 (1987) (expressing concern about burden imposed on municipal employers by Title VII disparate impact theory and resulting incentives to engage in racial quotas). Five important clarifications of Title VII's disparate impact analysis could serve to allay these fears and free employers to hire the best qualified candidates.

First, the Court should make clear that in order to establish a prima facie case, a plaintiff must come forth with *scientifically reliable* evidence of disparate impact. *Cf. Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589 (1993). The *Watson* plurality implicitly recognized such a requirement when it maintained that plaintiffs must "offer statistical evidence *of a kind and degree* sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group." 487 U.S. at 994 (emphasis added). Plaintiffs should not be allowed to proceed with litigation that is based on numerical analysis that is not "scientifically valid." *See Daubert*, 509 U.S. at 592-93. Plaintiff's analysis should be based on reliable data and methods, and the conclusions should flow logically from those facts and methods. *See id.* at 589-90. As this Court has made clear in the context of expert evidence, there must be a showing that the conclusions are both relevant and reliable: expert opinion must be excluded where "there is

simply too great an analytical gap between the data and the opinion proffered." *General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997).

Applying these principles in the context of evidence submitted to demonstrate a disparate impact, it is clear that there must taken into consideration the composition of the relevant applicant pool. A reliable showing of disparate impact cannot ignore that the applicant pool is comprised disproportionately of candidates of races different from that of plaintiffs, for example. Simply showing that there is a disparity between the results of a particular testing procedure and the composition of the general population cannot be sufficient. Rather, in conducting an analysis one must take into account whether the results of a particular testing procedure have a disparate impact given the underlying applicant pool. *See Int'l Brotherhood of Teamsters v. U.S.*, 431 U.S. 324, 340 n.20 (1977) (recognizing that statistical evidence of disparate impact might be limited if there was a "showing that the figures for the general population might not accurately reflect the pool of qualified job applicants").

Likewise, a reliable statistical analysis should take into account other factors that may explain differences in the rates at which different groups are impacted by a particular policy. *See* George R. La Noue, *The Impact Of Croson On Equal Protection Law And Policy*, 61 ALB. L. REV. 1, 10 n.50 (1997) ("The validity of a conclusion about the existence of discrimination stemming from a statistical analysis is dependant on whether the analysis has controlled for variables that legitimately affect the outcome and are not discriminatory."); Kingsley R. Browne, *Statistical Proof Of Discrimination: Beyond "Damned Lies"*, 68 WASH. L. REV. 477, 541 (1993) ("[E]ven when one may confidently conclude that a disparity is so large that it must have been caused by nonchance factors, statistical inference provides no insight at all into whether the nonchance factor was an impermissible one, especially where the statistical analysis

contains only rudimentary control for relevant variables."). Thus, for example, a proper statistical analysis should not ignore differences in educational background or prior work experience. If one group has a disproportionate number of Ph.D.'s, for example, non-race-based factors may explain their higher passage rates.

Finally, a proper statistical analysis should not ignore artifacts caused by a small sample size. Here, for example, it appears that the number of African-American candidates taking the test was exceedingly small. Thus, the effect on overall passage rates for this group might be largely affected by a single member of the group. Such dynamics may dramatically skew the results. *See* Elaine W. Shoben, *Differential Pass-Fail Rates in Employment Testing: Statistical Proof Under Title VII*, 91 HARV. L. REV. 793, 806-10 (1978).

These and other considerations should be part and parcel of any disparate impact analysis. Given the current state of the law, however, employers are left to guess concerning whether lawsuits may be allowed to proceed based on blatantly flawed and unreliable showings of disparate impact. This, in turn, gives employers an incentive to take actions that are, in themselves, discriminatory.

Second, the Court could elaborate upon the type of statistical evidence that is sufficient to establish a "disparate impact" within the meaning of 42 U.S.C. § 2000e-2(k)(1)(A)(i), and in particular reiterate the plurality statement in *Watson* that no "rigid mathematical formula" is sufficient to establish a prima facie case:

> [T]he plaintiff must offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group. Our formulations, which have never

> been framed in terms of any rigid mathematical formula, have consistently stressed that statistical disparities must be sufficiently substantial that they raise such an inference of causation.

487 U.S. at 994-95.

The "four-fifths rule" the court of appeals invoked here is just such an arbitrary and improper statistical test. *See* Pet. App. 27a (stating that employment test "presumptively had a disparate racial impact" based on four-fifths rule); *id.* at 38a (indicating that "a pass rate below the 'four-fifths rule[]' is sufficient to make out a prima facie case of discrimination."). The four-fifths rule only measures the difference in passage rates of the actual job candidates who took a particular test, which is a limited sample of the relevant population. *See* Shoben, *supra*, at 797-98.[4] Accordingly, it is not a test of statistical significance, and it becomes more inaccurate and less useful as the analyzed sample size decreases. *Id.* at 806-10. Because of these inaccuracies, many lower courts have specifically rejected the four-fifths rule as sufficient to establish a prima facie case of disparate impact. *See, e.g., Frazier v. Consolidated Rail Corp.*, 851 F.2d 1447, 1451-53 (D.C. Cir. 1988) (raw statistical data showing violation of four-fifths rule not sufficient to establish prima facie case); *Clady v. County of Los Angeles*, 770 F.2d 1421, 1428-29 (9th Cir. 1985) (applying statistical significance test rather than four-fifths rule).

Third, the Court should reiterate that statistical disparities alone do not constitute proof of discrimination. *See*

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[4] In this case, for example, the court of appeals found a violation of the four-fifths test based only on the small number of people who took the test. Pet. App. 26a-28a. Furthermore, apparently no attempt was made by Respondents to control for non-racial factors in studying the racial breakdown of the test results. *Id.* at 701a-702a.

Washington v. Davis, 426 U.S. 229, 242 (1976). Again, the *Watson* plurality is instructive, for it specifically "noted the danger that relying solely on statistical disparities as proof of discrimination under Title VII could result in the imposition of de facto quotas." *Lutheran Church-Missouri Synod v. FCC*, 154 F.3d 487, 494 (D.C. Cir. 1998) (citing *Watson*, 487 U.S. at 991-97). Recent experience in evaluating employment tests shows that it is virtually impossible to create a standardized test that does not have some disparate impact, even when more rigorous measures of statistical significance are used. *See* Michael Selmi, *Was the Disparate Impact Theory A Mistake?*, 53 U.C.L.A. L. REV. 701, 705 (2006) ("[T]he vast majority of [written employment] tests continue to have significant adverse impact."); Pet. App. 664a-665a (testimony of test creator about the ubiquity of adverse impact in all standardized tests). Accordingly, "[i]f avoiding disparate impact were a compelling government interest, then racial quotas in public employment would be the norm, and as a practical matter *Washington v. Davis* would be undone." *Biondo*, 382 F.3d at 684.

Fourth, this Court should reiterate its previous holding that a disparate impact plaintiff must "show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in 'efficient and trustworthy workmanship.'" *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975) (quoting *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 (1973)). Despite this Court's precedents, the court of appeals in this case allowed Respondents to take race-based remedial action without any evidence demonstrating the existence of non-discriminatory alternatives to the test they abandoned, and without even pinpointing any particular part of the test that might be altered to reduce its alleged disparate impact. Pet. App. 32a-34a.

Finally, the Court should make clear that, within the burden shifting framework set forth in 42 U.S.C. § 2000e-

2(k)(1)(A)(i), even where the defendant bears the burden of *production*, "the ultimate burden of proving that discrimination against a protected group has been caused by a specific employment practice remains with the plaintiff at all times." *Watson*, 487 U.S. at 997 (plurality). This case provides a stark example of why allocating the burden of *proof* to defendants to establish the validity of a clearly job-related, professionally-developed test tends to encourage employers to adopt quotas and disregard the results of such tests, contrary to the intent clearly expressed by Congress in subsections (h), (j) & (l) of Title VII.

The current realities regarding standardized tests, combined with the current legal uncertainties regarding the level of statistical evidence that can establish a prima facie case of disparate impact and the allocation of burdens of production and proof, have created a situation where some employers understandably feel they must choose between implementing de facto racial quotas or facing a costly lawsuit. Respondents embrace this dilemma, and argue that it should excuse their decision to bar all promotions. *See, e.g.*, Br. In Opp. at 18 n.11 (asserting that practical difficulties of defending against a disparate impact suit justify the actions taken here). Instead of embracing such a perverse result, this Court should clarify Title VII disparate impact analysis to bring it in line with Congress's expressed intention to prohibit racial quotas while encouraging and protecting genuine professionally-developed, job-related employment tests.

CONCLUSION

For the foregoing reasons, the court of appeals' decision should be reversed.

Respectfully submitted,

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Dated: February 26, 2009

Nos. 07-1428 and 08-328

IN THE

Supreme Court of the United States

FRANK RICCI, *et al.*,
Petitioners,

v.

JOHN DESTEFANO, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF RESPONDENTS

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March 2009

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF RESPONDENTS

The Equal Employment Advisory Council, a non-profit association comprised of the Nation's largest private sector corporations, respectfully submits this brief as *amicus curiae*.[1] The brief supports the position of Respondents before this Court in favor of affirmance.

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

INTEREST OF THE *AMICUS CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership includes over 300 major U.S. corporations. EEAC's directors and officers include many of the nation's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC an unmatched depth of knowledge of the legal and practical considerations relevant to interpreting and complying with workforce nondiscrimination requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

All of EEAC's members are employers subject to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et seq.*, and other federal employment-related laws and regulations. As employers, and as potential defendants to claims asserted under these laws, EEAC members have a substantial interest in the issue presented in this case regarding the discretion afforded to employers to consider and act upon the results of legally required statistical analyses of their selection procedures in ensuring a nondiscriminatory workplace. Specifically, EEAC has a direct and ongoing interest in ensuring that employers may voluntarily discontinue a selection process that reasonably appears to be having a statistically significant adverse impact on the basis of race, ethnicity, or gender. This latitude is fundamental to affording employers the discretion they need to comply with their responsibilities under Title VII.

EEAC seeks to assist this Court by highlighting the impact its decision may have beyond the imme-

diate concerns of the parties to the case. Accordingly, this brief brings to the Court's attention relevant matters that the parties have not raised. Because of its experience in these matters, EEAC is well-situated to brief this Court on the concerns of the business community and the significance of this case to employers.

STATEMENT OF THE CASE

Petitioners are firefighters for the City of New Haven, Connecticut, who in November and December of 2003 took civil service examinations for promotion to the supervisory ranks of Captain and Lieutenant within the Fire Department. Pet. App. 6a-7a. Pursuant to the collective bargaining agreement between the City and the firefighters' union, the written portion of the examinations comprised 60%, and the oral examinations 40%, of the applicants' overall scores. Pet. App. 7a. A total of 118 applicants, including 68 white, 27 African-American, and 23 Hispanic test takers, sat for the exams. Pet. App. 7a-8a. Candidates' names were placed on promotion lists in descending order based on their test scores. Once certified by the City's Civil Service Board, the promotion lists would remain valid for two years. Pet. App. 8a.

As many employers do, the City had invested significant time and expense in developing the promotion exams. When the exams were administered for the first time, however, the results revealed that the success rate for African-American and Hispanic test takers was significantly lower than the success rate for white test takers, indeed much more so than in prior years when different tests were used. Pet. App. 7a-8a.

Specifically, of the 118 individuals who took the written test and proceeded on to the oral test, 56 achieved a passing score, resulting in an overall pass rate of approximately 47%. The *actual* pass rate of African-Americans and Hispanics was less than the overall pass rate, and significantly lower than that of whites, however: while 41 (or approximately 60%) of the white test takers achieved a passing score, only 9 (or approximately 33%) African-Americans and 6 (or approximately 26%) Hispanics achieved a passing score. *Id.*

The City's then—Corporation Counsel, Thomas Ude, expressed concern that the test results appeared to have a significant adverse impact on African-Americans and Hispanics and thus could give rise to potential disparate impact liability under Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq*. Br. of Respondents, at 7 ("[A] significant adverse impact ... triggers a much closer examination, because it's like setting off a warning bell that there may be something wrong"). Consequently, five public hearings were held by the Civil Service Board regarding whether or not to certify the test results. Pet. App. 8a.

A number of individuals testified at the hearings, including representatives of an African-American firefighters association, who recommended that the Board, prior to certifying the lists, benchmark with nearby City of Bridgeport officials regarding their success in producing promotion lists having less adverse impact. Pet. App. 10a-11a. In contrast, representatives of white firefighters, including sev-

eral Petitioners, urged the Board to certify the results.[2] Pet. App. 9a.

The Board also later heard from the test developer, who defended the tests as "facially neutral." Pet. App. 11a-13a. Another testing expert subsequently testified, however, that the results revealed "relatively high adverse impact," "significantly and dramatically" more so than the tests he developed in the past. Pet. App. 14a. He also suggested that there might be alternative procedures that could be used in place of the written and oral tests, such as situational judgment tests, which have been shown to have less adverse impact. Pet. App. 15a-16a. Ude ultimately advised against certifying the test results because, among other things, doing so could amount to unlawful Title VII disparate impact discrimination. Pet. App. 18a. The Civil Service Board eventually voted against certifying the promotion lists. Pet. App. 19a.

One Hispanic and several white test takers sued the City and a number of its officials, claiming that the Board's failure to certify the promotion lists violated Title VII and the Equal Protection Clause. Pet. App. 5a. They contended, among other things, that the real motivation in rejecting the promotion lists (from which no selections were made) was to promote racial diversity within the Fire Department at the expense of whites and Hispanics. Pet. App. 19a-20a. For their part, Respondents claimed that the City was justified in not certifying the results based on its good faith belief that doing so could violate Title VII, given the significant adverse impact

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[2] Stakeholders on both sides of the debate threatened to sue the City depending on how it resolved the issue.

on African-Americans and Hispanics and the possibility that other alternative selection procedures having less adverse impact existed, but were not considered. Pet. App. 20a-21a.

The district court agreed, and granted the City's motion for summary judgment, which the Second Circuit, in a per curiam opinion, affirmed. Petitioners' motion for rehearing *en banc* was denied, with six judges joining a dissenting opinion. This Court granted certiorari on January 9, 2009.

SUMMARY OF ARGUMENT

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, prohibits employers not only from engaging in intentional race discrimination, but also from engaging in employment practices that have an unintentional discriminatory impact on protected groups. Although Petitioners characterize it far differently, this case is about the right of an employer under Title VII to refuse to utilize the results of a test that has produced statistically significant adverse impact against minority test-takers where other, equally effective selection procedures having less adverse impact may exist but were not considered.

This issue is of great importance to the many private sector employers that routinely utilize employment tests as part of their employment selection processes. Those employers continually strive to ensure that their selection practices fully comply with Title VII's proscription against disparate impact discrimination. To accomplish that aim, they must be afforded the flexibility that is inherent in Title VII to perform diagnostic, statistical analyses to determine whether or not an employment test is functioning as intended, that is, as a race-neutral evaluation tool. An employer's decision not to apply

test results that are so statistically flawed that they give rise to an inference of unlawful discrimination against protected minority groups simply cannot be considered actionable under Title VII.

Petitioners urge the Court to find that Respondents' decision not to certify the results of two exams that had statistically significant adverse impact against African-Americans and Hispanics was based on impermissible, race-based considerations—rather than on legitimate concerns about actually committing a discriminatory employment practice. Such a view, if adopted by the Court, would place employers subject to Title VII in an untenable position of having to choose between potential liability for disparate impact discrimination for failing to consider alternative selection procedures where a test has adverse impact, and potential liability for "reverse" race discrimination against the statistically "favored" group. Such a result would run counter to the purpose and intent of Title VII, and would contravene this Court's longstanding interpretation of an employer's obligation under the Act to avoid discrimination that is "fair in form, but discriminatory in operation." *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

ARGUMENT

I. AN EMPLOYER'S DECISION SIMPLY NOT TO UTILIZE THE RESULTS OF AN EMPLOYMENT TEST THAT HAS PRODUCED SIGNIFICANT ADVERSE IMPACT AGAINST PROTECTED GROUPS, WITHOUT MORE, IS NOT ACTIONABLE UNDER TITLE VII

Despite Petitioners' attempt to characterize it as one involving nothing more than racial preferences

and misplaced notions about workplace "diversity," at its core, this case is about whether—and to what extent—an employer lawfully may refuse to utilize the results of a test that has significant adverse impact against minorities where other, equally effective selection procedures having less adverse impact may exist but were not considered. The simple and straightforward answer is that an employer's conscious decision *not* to discriminate by continuing to use a questionably valid selection procedure in light of significant adverse impact cannot give rise to a cause of action under Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, for "reverse" disparate treatment discrimination against the statistically "favored" group. In other words, an employer's good faith effort to comply with Title VII is not evidence of discriminatory animus and thus does not, in itself, violate the Act. Any other result would contravene the plain text, meaning and purposes of Title VII, and would unsettle nearly four decades of federal court precedent, beginning with this Court's seminal ruling in *Griggs v. Duke Power Co.*, regarding an employer's obligation to avoid discrimination that is "fair in form, but discriminatory in operation." 401 U.S. 424, 431 (1971).

A. Title VII Expressly Bars Application of a Test Having Adverse Impact, Unless the Employer Can Demonstrate That Its Continued Use of the Test Is Job-Related and Consistent with Business Necessity

In addition to barring intentional discrimination on the basis of race, color, religion, sex or national origin, Title VII also expressly prohibits application of any policy, practice or procedure that has a

statistically significant adverse impact on a protected group, unless the employer can demonstrate that the procedure is job-related and consistent with business necessity. 42 U.S.C. § 2000e-2(k)(1)(A). The Act also permits employers to utilize professionally designed tests as part of their employment selection procedures, as long as the test is not "designed, intended or used to" discriminate on the basis of an individual's membership in a protected class. 42 U.S.C. § 2000e-2(h).

The Uniform Guidelines on Employee Selection Procedures (Uniform Guidelines), 29 C.F.R. pt. 1607, provide the framework for conducting statistical analyses to determine whether tests and other selection practices have an adverse impact on women or minorities. Like Title VII, under the Uniform Guidelines, which have been codified by the U.S. Equal Employment Opportunity Commission (EEOC) and the U.S. Department of Labor, Office of Federal Contract Compliance Programs (OFCCP) in their administrative regulations, *see* 29 C.F.R. pt. 1607 (2008); 41 C.F.R. § 60-3 (2008), the use of any selection procedure that has adverse impact is considered discriminatory, unless the employer has a legitimate business justification for its use. 42 U.S.C. § 2000e-2(k)(1)(A).[3]

A substantial number of employers subject to Title VII are also federal government contractors subject to

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[3] The "Questions and Answers" accompanying the Uniform Guidelines provide that employers also "have the option of choosing alternative techniques which eliminate adverse impact." Questions and Answers to Clarify and Provide Common Interpretation of the Uniform Guidelines on Employee Selection Procedures, 44 Fed. Reg. 11,996, 12,001 (Mar. 2, 1979) (Question 31).

Executive Order 11,246, 3 C.F.R. 339 (1964-65 Comp.), and OFCCP's implementing regulations. Both the EEOC and OFCCP rely heavily on the Uniform Guidelines in evaluating employers' compliance with Title VII and Executive Order 11,246. Those employers thus are acutely aware of and concerned with performing the types of statistical analyses identified in the Uniform Guidelines that may signal potentially problematic employment practices.

Under the Uniform Guidelines, employers must conduct, at least annually, statistical analyses to determine whether their selection procedures have an adverse impact on women or minority groups comprising at least 2% of the labor force in the relevant labor market area or the applicable workforce. The Uniform Guidelines' so-called "four-fifths rule" is designed to assess whether an employment test or other selection procedure is operating in a nondiscriminatory manner. The calculation involves a comparison of the relative success rates for the different race/sex/ethnic groups that took the test. A selection procedure generally will be considered to have adverse impact under the Uniform Guidelines if the selection rate for women or minorities "is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate . . . while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact." 29 C.F.R. § 1607.4(D).

The EEOC strongly advises employers subject to Title VII and the Uniform Guidelines to ensure that their use of employment tests and other selection procedures fully comply with the law. Where a statistical disparity is found, for instance, the agency urges companies to, among other things, explore the

existence of other, equally effective selection procedures having less adverse impact. *See EEOC Fact Sheet on Employment Tests and Selection Procedures* (Feb. 2008).[4] Any employer that has doubts regarding whether or not a test that has produced significant adverse impact is valid (in the sense that it is an accurate predictor of on-the-job success) therefore is well-advised, in *every* case, to step back and suspend the selection process so as to further investigate. Doing so promotes, rather than contravenes, Title VII's discrimination prohibitions, by ensuring that a potentially discriminatory practice is not permitted to poison an otherwise legitimate employment selection process.

B. Diagnostic Statistical Analyses Conducted by Employers Seeking To Evaluate Whether or Not an Employment Test Is Functioning as a Race-Neutral Evaluation Tool Are Not "Race-Based" Decisions

The analysis Respondents sought to undertake in this case is similar to that which is required of every employer subject to Title VII and the Uniform Guidelines, and is an essential tool in ensuring compliance with Title VII's prohibition against disparate impact discrimination. Petitioners have mischaracterized the assessment as one that necessarily involves race-based decision making. Indeed, at various points in their brief, Petitioners have referred to this diagnostic process as amounting to nothing more than "racial balancing," "race coding," "intentional racial classifications," "explicit racial classifications,"

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[4] *available at* http://www.eeoc.gov/policy/docs/factemployment_procedures.html

"soft quotas," and "quotas." While such terms are highly charged, they simply are inaccurate characterizations of the process set forth in the Uniform Guidelines and required by Title VII.

In reality, the qualitative and quantitative analyses Respondents relied upon in deciding whether or not the test results at issue should be certified were designed to assess the *tests*, not the relative qualifications or characteristics of the candidates themselves. Here, the success rate for African-American test takers and the success rate for Hispanic test takers was significantly less than the success rate for white test takers. This was true for the combined totals for the two tests as well as for each test individually (that is, the Captain's test and the Lieutenant's test). In practical terms, this result means that the tests were not functioning as race-neutral evaluation tools. In legal terms, this result means that use of the test as a selection device for promotions would be considered to "be discriminatory and inconsistent with" the Uniform Guidelines. 29 C.F.R. § 1607.3(A).

Contrary to Petitioners characterizations, the problem was not that "too many whites passed the test." The actual flaw was that a test—designed as a neutral tool for evaluating candidates—had produced results in which African-American test takers (as a group) and Hispanic test takers (as a group) were significantly less successful on the test than white test takers (as a group), which raised serious questions about the effectiveness of the test. When a selection practice that is intended to be a neutral evaluation tool produces results that show statistical disparity along racial lines, there is cause for concern. That concern flows from essentially the same rationale that has prompted this Court to closely

review any governmental action based on race. That is, a group classification based on race is in most all circumstances irrelevant. *See Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 127 S. Ct. 2738, 2765 (2007) ("[G]overnmental action based on race—a *group* classification long recognized as 'in most circumstances irrelevant and therefore prohibited'—should be subjected to detailed judicial inquiry . . .") (citation omitted).

Here, the employer's scrutiny of the test results was appropriate, not because of the race of the person who received the highest score, but because there was no apparent reason why a neutral process should deliver results with such a statistically significant disparity on the basis of race or ethnicity. Under such circumstances, it is incumbent upon the employer to scrutinize the disparity giving rise to an inference of race discrimination so as to avoid a violation of Title VII. No employer will accomplish that aim if review of the offending test itself is considered "race-based" decision making that could subject it to liability for the very conduct it seeks to avoid.

II. EMPLOYERS FACED WITH A SIGNIFICANT RACIAL DISPARITY IN THE RESULTS OF AN EMPLOYMENT TEST MUST BE PERMITTED TO EXERCISE THE DISCRETION REQUIRED TO ENSURE COMPLIANCE WITH TITLE VII

When presented with results indicating that an employment selection test has a statistically significant adverse impact on the basis of race, ethnicity, or gender, an employer has several options, including making selections on the basis of the deficient instru-

ment and inviting a disparate-impact lawsuit from the disadvantaged individuals. Or, the employer can simply suspend using the test and make the selections on some other basis entirely.

Petitioners in this case contend that once a test is given and the results are known only the first option is consistent with the proscriptions of Title VII. Their argument is that suspending the test in order to avoid the resulting statistically significant selection disparities necessarily constitutes unlawful disparate treatment under the statute. Such an interpretation of Title VII is at odds with Congress's preference for voluntary compliance by employers—and would seriously erode employers' ability to monitor their employment practices proactively to ensure they are nondiscriminatory.

Addressing statistically significant disparities in tests or other employment selection procedures is similar to a variety of other proactive measures progressive companies undertake to ensure nondiscriminatory work environments. Such proactive measures may be race- or gender-*conscious* but do not involve race- or gender-*based* decision making. Examples of such measures include:

- Monitoring outreach and recruiting practices to ensure that all individuals may apply for employment, regardless of race, ethnicity or gender. Such practices might include targeted outreach efforts at historically Black or women's colleges, and advertising in media and niche electronic databases likely to reach minorities and women as a supplement to the company's broader recruitment practices;

- Seeking to expand future applicant pools through early-intervention programs in schools and community organizations;
- Reviewing and modifying corporate policies and programs that are facially discriminatory or discriminatory in their application;
- Providing services such as child care, flexible schedules, and education support that are made available to all employees, but that may serve to overcome barriers to employment that often fall more harshly on women and minorities; and
- Monitoring workforce demographic patterns (including the impact of HR practices) for indications that the company's equal opportunity policies are perhaps not being followed.

Such measures are undertaken in the interest of ensuring to the maximum extent possible that the employer remains at all times in compliance with Title VII. The measures often are race- and gender-*conscious* in the sense that they are intended to eliminate artificial barriers to employment based on one's race or gender, but they do not involve race- or gender-based decision making.

Suspending use of an employment test that has statistically significant adverse impact against minorities is no different than the measures described above. Here, for instance, the decision not to certify the tests arguably may have been race-conscious (in the sense that the City understandably was concerned with disparate impact against African-American and Hispanic test takers), but the action was taken specifically to ensure that there were no artificial barriers to employment erected as a result

of the test. Furthermore, no race-based promotion decisions were predicated upon the test results.

Voluntary measures such as these are precisely what Congress intended in passing Title VII, and what the EEOC and this Court have encouraged. Congress intended voluntary compliance to be the "preferred means of achieving the objectives of Title VII." *See, e.g., Local No. 93, Int'l Ass'n of Firefighters* v. *City of Cleveland,* 478 U.S. 501, 515 (1986) (citing *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974) and *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 417-18 (1975)). The EEOC's regulations provide that in enacting Title VII Congress "strongly encouraged employers ... to act on a voluntary basis to modify employment practices and systems which constituted barriers to equal employment opportunity, without awaiting litigation or formal government action." 29 C.F.R. § 1608.1(b).

With this delegated responsibility comes a corresponding obligation on the part of the enforcement agencies and the courts to afford employers a degree of latitude in adapting their employment practices to Title VII requirements. The EEOC's regulations explicitly recognize this need in stating that "persons subject to title VII must be allowed flexibility in modifying employment systems and practices to comport with the purposes of title VII." 29 C.F.R. 1608.1(c) (cited in *Johnson* v. *Transportation Agency,* 480 U.S. 616, 626, 630 n.8 (1987); *Local No. 93,* 478 U.S. at 519).

In provisions that speak directly to proactive evaluations of tests and other selection procedures, the EEOC's regulations contemplate that employers will undertake "[r]easonable, self analys[es] . . . to determine whether employment practices do, or tend

to, exclude, disadvantage, restrict or result in adverse impact . . . ." 29 C.F.R. § 1608.4(a). The regulations also specifically reference the Uniform Guidelines in stating that "[w]hen an employer has reason to believe that its selection procedures have exclusionary effect . . . , it should initiate affirmative steps to remedy the situation," 29 C.F.R. § 1608.4(c)(1), which may include, but are not limited to "[r]evamping selection instruments or procedures which have not yet been validated in order to reduce or eliminate exclusionary effects on particular groups in particular job classifications." *Id.* If employers are afforded the latitude to "revamp" unvalidated selection instruments in the interest of reducing or eliminating adverse impact, then it follows that employers would also have latitude under the EEOC's regulations to suspend use of an instrument altogether and rely upon other unrelated selection criteria.

This Court also has afforded employers latitude under Title VII to address statistical disparities in the workplace through race- and gender-conscious measures. In *United Steelworkers* v. *Weber*, 443 U.S. 193, 208 (1979) a private employer's adoption of an affirmative action plan was justified on the basis of a "manifest racial imbalance" in its workforce. Similarly, in *Johnson v. Transportation Agency*, 480 U.S. 616, 626 (1987), a public employer's promotion of a qualified woman over a qualified man to address a manifest imbalance in the workforce was deemed to be "a nondiscriminatory rationale for [the promotion] decision."

Both cases involved explicit race or gender classifications that were viewed by the Court as being reasonable employer actions undertaken to address

statistical disparities that could give rise to potential Title VII liability. The "triggers" for the employers' actions in both cases were statistical imbalances in the workforces deemed by the Court to be "manifest." The race- and gender-conscious steps that were taken to address those imbalances were deemed to be reasonable because their impact on non-preferred individuals was limited and they were "narrowly tailored" to address the identified imbalances.

In assessing the degree of discretion an employer has to act in a particular case, it is useful to look not just at whether there is a statistical disparity, but also at how significant is that disparity. While the Uniform Guidelines' "four-fifths" rule often is described as a rule of thumb, there are more sophisticated statistical analyses that have been used in discrimination cases. *See Watson v. Fort Worth Bank*, 487 U.S. 977, 995 (1988). Among these are the so-called standard deviation analyses used in both jury selections cases, *see, e.g., Castaneda v. Partida*, 430 U.S. 482, 496 n.17 (1977), and in employment cases, *see, e.g., Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 311 n.17 (1977).

Here, the statistical disparities in the test results not only exceeded the Uniform Guideline's four-fifths "rule of thumb," but amounted to approximately 3.5 standard deviations, a level clearly recognized by this Court as sufficient to create an inference of discrimination under Title VII.[5] *See Hazelwood*, 433 U.S. at 311 and n.17. Moreover, deviation of this degree

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[5] EEAC performed an internal analysis of the data applying the "test of two proportions," a standard test used by enforcement agencies (particularly the OFCCP) to evaluate statistically significant adverse impact in employment selection procedures.

means it is almost impossible for the racial disparity observed in the test results to have occurred randomly. Surely a disparity of this significance must give the employer discretion to discontinue the flawed selection process.

Another consideration in examining the extent of an employer's discretion is the type of jobs or job categories involved. In *Weber* and in *Johnson*, one of the factors identified in approving the employers' actions was that the positions involved were in traditionally segregated job categories. *See Weber*, 443 U.S. at 209; *Johnson* 480 U.S. at 635. In this case, Petitioners asserted that previous exams given for these jobs in the Fire Department had reflected adverse impact, but the employer had nonetheless gone forward with promotions.

Petitioners argue that the employer's decision to now act because of the adverse impact in the current exam results should be viewed with suspicion. Contrary to their assertions, however, where the adverse impact is in an area in which there traditionally has been an imbalance, the employer must be given more discretion to act to prevent current discrimination. By declining today to use a selection practice that is reflecting adverse impact, the employer may be able to avoid a need in the future to take the types of action approved in *Weber* and *Johnson* because of an overall manifest imbalance in the job category.

Even as many barriers to equal opportunity have been removed, there remain challenges that may be complex and longstanding. Having reviewed all of the testimony by testing experts and others at the Civil Service Board hearing, the district court below observed, "[i]t appears that the reasons for testing

disparities remain elusive. . . . [E]xperts on standardized testing nationwide have been unable to satisfactorily fully explain the reasons for the disparity in performance observed on many tests." Pet. App. 34a. The law provides employers the latitude to rely on selection procedures that have adverse impact where certain actions have been taken and express conditions met. It follows, then, that employers who choose not to proceed in the face of adverse impact where there is uncertainty as to, for instance, the validity of the selection procedure or existence of less discriminatory alternative procedures, should be shielded from claims such as those raised by Petitioners.

This case does not involve an affirmative action plan, nor does it involve explicit racial classifications, but the rationale underlying the Court's decisions in *Weber* and *Johnson* to permit employers to use race- and gender-conscious measures in limited circumstances to address potential Title VII liability is instructive. In response to a manifest disparity, Respondents simply discontinued reliance upon a test in which they lacked confidence and which they felt could not be defended. This measure did not entail any racial preferences nor did it have a direct impact on any of the firefighters who took the test—it simply meant that all of them, regardless of race, would have their eligibility for promotion evaluated by other means.

EEAC member companies are committed to compliance with Title VII and other employment nondiscrimination laws. They also believe that Congress appropriately established voluntary compliance as the preferred route to enforcing those laws. Voluntary compliance cannot be accomplished, however, if

employers are placed in the untenable position of having to choose between maintaining selection practices that generate race-based statistical disparities sufficient to sustain a disparate impact claim, or addressing those disparities at the risk of encouraging a disparate treatment claim.

EEAC member companies strive to identify and eliminate all practices that operate to artificially limit employment opportunities on the basis of race, ethnicity or gender. Employment tests and other selection practices can serve as such barriers. Eliminating these practices is consistent with and encouraged by Title VII. Voluntary compliance will be impossible to achieve if steps undertaken in good faith to eliminate race-based statistical disparities are deemed to constitute unlawful disparate treatment.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

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March 2009

Nos. 07-1428 & 08-328

IN THE
Supreme Court of the United States

FRANK RICCI, ET AL.,
Petitioners,

v.

JOHN DESTEFANO, ET AL.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF INDUSTRIAL-ORGANIZATIONAL PSYCHOLOGISTS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici are experts in the field of industrial-organizational psychology and are elected fellows of the Society for Industrial and Organizational Psychology ("SIOP"), the division of the American Psychological Association that is responsible for the establishment of scientific findings and generally accepted professional practices in the field of personnel selection. *Amici* also have extensive experience in the design and validation of promotional tests for emergency services departments, including fire and police departments across the country. *Amici* have an interest in ensuring the scientifically appropriate choice, development, evaluation, and use of personnel selection procedures.

Professor Herman Aguinis is the Mehalchin Term Professor of Management at the University of Colorado Denver Business School. In addition to his extensive scholarship and research on personnel selection, Professor Aguinis served on the Advisory Panel on the most recent revision of the *Principles for the Validation and Use of Personnel Selection Procedures* (4th ed. 2003) ("*Principles*"), *at* http://www.siop.org/_Principles/principles.pdf.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represents that it authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for *amici* also represents that all parties have consented to the filing of this brief in the form of blanket consent letters filed with the Clerk.

and testified extensively on issues relating to firefighter promotion. He served as President of SIOP from 1992 to 1993.

Professor Irwin Goldstein is currently Senior Vice Chancellor for Academic Affairs in the University System of Maryland. From 1991 to 2004, he served as Professor and Dean of the College of Behavioral and Social Sciences at the University of Maryland College Park. He has published extensively on validation, job selection, and training. He also served as President of SIOP from 1985 to 1986.

Dr. James Outtz, Ph.D., has more than 30 years' experience in the design and validation of personnel selection procedures. In 2002-2003, Dr. Outtz served on the Ad Hoc Committee that oversaw the 2003 revision of the *Principles*, the official policy statement of SIOP. Dr. Outtz also has served as a consultant for the City of Bridgeport, Connecticut, in designing the city's promotional examinations for fire lieutenant and captain positions.

Professor Sheldon Zedeck is Professor of Psychology at the University of California at Berkeley and Vice Provost for Academic Affairs and Faculty Welfare. Professor Zedeck's research and writing focuses on employment selection and validation models. Professor Zedeck served on the Ad Hoc Committee on the 2003 revision of the *Principles* and as President of SIOP from 1986 to 1987.

SUMMARY OF ARGUMENT

The City of New Haven ("City"), acting through its Civil Service Board ("Board"), reasonably declined to certify the results of the 2003 New Haven Fire Department ("NHFD") promotional examinations for captain and lieutenant because the validity of the tests could not have been substantiated under accepted scientific principles in the field of industrial-organizational ("I/O") psychology and applicable legal standards. Based on their expertise in the field of I/O psychology and their experience in employment test design, *amici* have identified at least four serious flaws in the tests that undermined their validity: (1) their admitted failure to measure critical qualifications for the job of a fire company officer; (2) the arbitrary, scientifically unsubstantiated weighting of the multiple-choice and oral components of the test battery; (3) the lack of input from local subject-matter experts regarding whether the tests matched the content of the jobs; and (4) use of strict rank-ordering without sufficient justification. Members of the Board thus reasonably concluded that it was unlikely, if not impossible, that the tests could be demonstrated to be valid.

Petitioners' claim that the decision not to certify the NHFD test results constituted a deviation from merit-based selection is inaccurate because of these clear and serious flaws in the design of the tests and the proposed use of the test scores. To the contrary, due to those flaws, which are apparent from the record below, there is no basis to conclude that certification of the test results would have led to the promotion of the most qualified candidates.

Moreover, several of the tests' flaws – namely, the unsubstantiated weighting of the test components

and use of strict rank-ordering – contributed to their adverse impact on racial subgroups, specifically African-American and Hispanic candidates. Thus, the tests not only failed to support an inference of superior job qualification from higher scores, but also simultaneously introduced a likely source of bias against minority candidates. In a predominantly minority city such as New Haven, bias against minority promotion exacerbates the public-safety risks of flawed tests by undermining the perception of fairness and cohesiveness among firefighters and by impairing the overall public effectiveness of the department. Thus, although the City had already approved and administered the test, the City appropriately concluded that costs to the NHFD and the local community would outweigh any potential benefit gained from certifying the tests.

The City could (and properly should) have adopted an alternative method of promotional selection to reduce the tests' adverse impact. At the very least, the City should have used scientifically substantiated weighting for the test components, which would likely have led to a reduced emphasis on the written component. Also, it could have discarded rank-ordering in favor of a "banding" approach, which treats candidates as equally qualified if their scores lie within a certain range reflecting the test's error of measurement. Rather than focus on the tests themselves, banding focuses on how test scores are used to make hiring decisions. Banding has been demonstrated, in some circumstances, to produce modest reductions in adverse impact without compromising the validity of the testing procedures in question. Moreover, the City could have adopted other options such as an "assessment center" that included behav-

ioral simulations of critical job components as part of the exams. Over the last 30 years, I/O psychology research has robustly confirmed that a properly validated assessment center can substantially reduce the adverse impact against minority candidates in the context of jobs such as firefighting.

In sum, given the flaws in the NHFD exams, which exacerbated the adverse impact on minority candidates, and given the availability of proven alternative selection methods, the City had reasonable, race-neutral grounds for deciding against certifying the results of the flawed tests. Indeed, under Title VII of the Civil Rights Act of 1964, it had *no choice* but to decline to certify the results. Petitioners' attempt to turn a decision *compelled by* Title VII into a violation of Title VII on the basis of mere insinuations about the Board's supposed racial biases turns the statute on its head and should be rejected.

ARGUMENT

I. THE 2003 EXAMINATIONS CONTAINED FATAL FLAWS THAT UNDERMINED THEIR ABILITY TO SELECT THE MOST QUALIFIED CANDIDATES

A critical and oft-repeated premise of petitioners' brief is that the 2003 NHFD examinations were "composed and validated" based on the *Uniform Guidelines on Employee Selection Procedures* ("*Uniform Guidelines*"), *see* 29 C.F.R. pt. 1607 (EEOC), and thus (1) actually "served their purpose of screening out the unqualified and identifying the most qualified," and (2) would have withstood scrutiny in a disparate-impact lawsuit brought by minority officer candidates. Pet. Br. 7, 35; *see also id.* at i (assuming in the question presented that the exams were "content-valid"). However, petitioners' premise lacks scientific

foundation. Under applicable I/O psychology principles and legal standards, there was no reasonable likelihood that the City could have demonstrated that the NHFD promotional examinations were valid.

A. Proper Validation Of Employment Tests According To Established Standards Is Essential To Ensuring Fair, Merit-Based Selection

A central objective of the field of I/O psychology is to develop generally accepted professional standards for the design and use of personnel-selection procedures, including employment tests, based on scientific data and analysis. The federal government has issued the *Uniform Guidelines*, which establish a federal standard for employment testing, *see* 29 C.F.R. § 1607.1(A), and "are intended to be consistent with generally accepted professional standards for evaluating standardized tests and other selection procedures," including the American Psychological Association's *Standards for Educational and Psychological Tests* ("APA *Standards*"), *id.* § 1607.5(C); *see Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971) (holding that the *Uniform Guidelines* are "entitled to great deference"). The *Principles* are designed to be consistent with the APA *Standards* and represent the official policy statement of the Society for Industrial and Organizational Psychology ("SIOP"), a division of the APA, regarding current I/O psychology standards for personnel selection. *See Principles* at ii, 1.

"Validity is the most important consideration in developing and evaluating selection procedures." *Id.* at 4. "Validation" is the process of confirming that an employment test is "predictive of or significantly correlated with important elements of job perform-

ance." 29 C.F.R. § 1607.5(B).[2] In this case, for the reasons set forth below, at least four aspects of the NHFD promotional tests were flawed or arbitrary, and thus made it all but impossible for the City to show that the tests were valid.

The lack of evidence supporting the validity of the NHFD tests undermines their value as a selection tool. Proper validation of an employment test is critical to merit-based personnel selection because it ensures that there is a scientific basis for inferring that a higher test score corresponds to superior job skills or performance. *See Principles* at 4 (defining validity as "the degree to which accumulated evidence and theory support specific interpretations of test scores entailed by proposed uses of a test"); 29 C.F.R. § 1607.1(B). Moreover, proper validation promotes fairness and equal opportunity by ensuring that any disparate impact on subgroups is traceable to job requirements rather than contamination or bias in testing methodology. *See* 29 C.F.R. § 1607.3(A)

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[2] The *Principles* and the *Uniform Guidelines* identify three types of evidence that support an inference of validity: "content," "criterion," and "construct." *See Principles* at 4-5; 29 C.F.R. § 1607.14(B)-(D). The three are not mutually exclusive categories, but rather refer to evidence supporting the inference that a test identifies those who are qualified to do the job. *See Principles* at 4. Content validity supports such an inference by showing that the test's content matches the essential content of the job, while criterion validity supports the inference by showing that test results successfully predict job performance. Construct validity is more abstract and is shown by evidence that the test measures the degree to which candidates have characteristics, or traits, that have been determined to lead to successful job performance. The flaws described in this brief undermine the content validity of the NHFD exams, which is the only evidence of validity asserted by petitioners and the only feasible type of validation in these circumstances.

(providing that a procedure that has an adverse impact "will be considered to be discriminatory . . . unless the procedure has been validated in accordance with these guidelines"); *Principles* at 7.

Validation is especially critical in the context of promotional exams for important public-safety leadership positions, such as fire company officers. Ensuring the selection of the most qualified fire officers saves lives. Accordingly, all state and local governments have a strong, race-neutral interest in declining to use promotional tests for fire officers that are shown to lack validity. Indeed, a legal regime in which state and local governments are hamstrung into implementing the results of such tests threatens the lives of the citizens they are committed to protect.[3] In this case, the City acted reasonably by declining to certify the NHFD promotional test results because the tests were fatally flawed.

B. Contrary To Petitioners' Premise, The 2003 NHFD Examinations Could Not Have Been Validated Under Established Principles

Petitioners' premise that the NHFD tests were properly validated rests on insufficient factual evidence, consisting merely of the fact that the test

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[3] While critical, the validity of a test is only one of several issues that may legitimately be taken into account in making a decision on whether and how to use a test. The decision to use a particular test, or to use a test in a particular way, is made within a broader social and organizational context and appropriately takes into account possible "side effects" that could be costly or detrimental for the organization and the people served by the organization. *See* Herman Aguinis & Erika Harden, *Will Banding Benefit My Organization? An Application of Multi-Attribute Utility Analysis, in Test-Score Banding in Human Resource Selection* 193, 196-211 (Herman Aguinis ed., 2004).

designer, I/O Solutions ("IOS"), conducted what has been described as a job analysis, using "questionnaires, interviews, and ride-along exercises with incumbents to identify the importance and frequency of essential job tasks," and then had only one individual, a fire battalion chief in Georgia, review the tests. Pet. Br. 7; *see also id.* at 52. Petitioners also claim that the test designer provided "oral assurance of validity" and that the NHFD's Chief and Assistant Chief "thought the exams were fair and valid." *Id.* at 35.

Contrary to petitioners' assertions, conducting a job analysis – while in most cases necessary to a test's validity – is not alone sufficient to demonstrate validity. *See, e.g.*, 29 C.F.R. § 1607.14(B). Moreover, the *Uniform Guidelines* specifically reject the use of "casual reports of [a test's] validity," such as "testimonial statements and credentials of" IOS, and "non-empirical or anecdotal accounts" such as the comments of the NHFD's Chief and Assistant Chief. *Id.* § 1607.9. What the *Uniform Guidelines* and the *Principles* require is a rigorous analysis of the design and proposed use of the exam according to accepted principles of I/O psychology.[4]

Judged against the proper standards, there was no reasonable likelihood that the examinations administered by the NHFD could have been demonstrated to be valid, after the fact, according to generally accepted strategies for validation.[5]

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[4] The fact that IOS was purportedly prepared to issue a validation study does not prove the tests were valid because the test-design process that the study would have described was fatally flawed.

[5] Petitioners' contention that the City avoided a full-fledged analysis of the validity of the examinations because it would

1. The Test Designer Conceded That the Exams Did Not Attempt To Measure Command Presence, a Critical Job Attribute

It is a fundamental precept of personnel selection that an employment test should be constructed to measure important knowledge, skills, abilities, and other personal characteristics ("KSAOs") needed for the job. *See* 29 C.F.R. §§ 1607.14(B)(3), 1607.14(C)(4). The omission from the testing domain of a KSAO that is an important job prerequisite – known in I/O psychology as "criterion deficiency" – vitiates the entire justification for the employment test, which is to select individuals accurately based on their capacity to perform the job in question. A test that makes no attempt to measure one or more critical KSAOs cannot be validated under established standards. *See, e.g., Principles* at 23; *see also Firefighters Inst. for Racial Equality v. City of St. Louis*, 549 F.2d 506, 512 (8th Cir. 1977) ("*FIRE I*") (validity "requires that an important and distinguishing attribute be tested in some manner to find the best qualified applicants").

As the City's then-corporate counsel, Thomas Ude, recognized, the distinguishing feature of the job of a fire officer, as opposed to an entry-level firefighter, is responsibility for supervising and leading other firefighters in the line of duty. *See* JA138-39; *see also* Matthew Murtagh, *Fire Department Promotional Tests* 152 (1993) ("[C]ompany officers, lieutenants and

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have been required to certify the test results is thus unsupportable. *See* U.S. Br. 19 ("An employer acts reasonably in not incurring [the burdens of a validity study] when it has significant questions concerning a test's job-relatedness or reasonably believes that better alternatives to the test may exist.").

captains, are the primary supervisors."); Anthony Kastros, *Mastering the Fire Service Assessment Center* 45 (2006). Leadership in emergency-response crises requires expertise in fire-management techniques and sound judgment about life-and-death decisions. Moreover, critically, it also requires a steady "presence of command" so that the unit will follow orders and respond correctly to fire conditions. *See, e.g.*, Richard Kolomay & Robert Hoff, *Firefighter Rescue & Survival* 5 (2003). Command presence requires an officer on the scene of a fire to act decisively, to communicate orders clearly and thoroughly to personnel on the scene, and to maintain a sense of confidence and calm even in the midst of intense anxiety, confusion, and panic. *See id.* at 5-13. Command presence generates respect for the officer among subordinates and is thus essential to order and discipline within the unit. *See* Murtagh at 152.

Simply put, command presence is a hallmark of a successful fire officer. *See, e.g.*, Chase Sargent, *From Buddy to Boss: Effective Fire Service Leadership* 21 (2006) ("No individual leader ever forgets the first time that their command presence was put to the test."). Virtually all studies of fire management emphasize that command presence is vital to the safety of firefighters at the scene and to the successful accomplishment of the firefighting mission and the safety of the public. *See, e.g.*, John F. Coleman, *Incident Management for the Street-Smart Fire Officer* 21-26 (2d ed. 2008); Kastros at 45; Vincent Dunn, *Command and Control of Fires and Emergencies* 1-6 (1999).

Here, the developer of the NHFD promotional exams, IOS, admitted that those exams were not designed to measure "command presence." Pet. App.

738a (Legel Dep.) ("Command presence usually doesn't come up as one of the skills and abilities we even try to assess.").[6] A high test score thus could not support an inference that the candidate would be a good commander in the line of duty; conversely, those candidates with strong command attributes were never given an opportunity to demonstrate them. Given the importance of command presence to the job of a fire officer, as the City recognized, this failure alone rendered the tests deficient. *See* JA139 (testimony of Mr. Ude that the "goal of the test is to decide who is going to be a good supervisor ultimately, not who is going to be a good test-taker").

In *FIRE I*, the Eighth Circuit recognized, in a similar situation, that the St. Louis fire captain's exam contained the "fatal flaw" of failing to test for "supervisory ability." 549 F.2d at 511. Because "supervisory ability" was a central requirement to the job of a fire captain, that failure precluded validation of the tests under the *Uniform Guidelines*. *Id.* The admitted failure of IOS to test command presence, a key attribute for any supervisory fire officer, would have led to the same result in this case.

2. The Weighting of the Multiple-Choice and Oral Interview Portions of the Exams Was Arbitrary and Could Not Be Validated

Even putting aside the failure of the NHFD exams to measure a critical aspect of the fire officer's responsibilities, the tests were seriously flawed for a second reason, stemming from the imposition of a

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[6] However, IOS's representative, Chad Legel, conceded that "command presence" could be measured through the use of an assessment center. *See infra* p. 31.

predetermined 60/40 weighting for the written and oral interview components of the tests with no evidence that those weights matched the content of the jobs. Scientific principles of employment-test validation require not only that tests reflect the important KSAOs of the job, but also that the results from those tests be weighted in proportion to their job importance. Indeed, even assuming that a test measured the full range of important KSAOs, which the NHFD tests did not, *see supra* Part I.B.1, a test that gives inappropriate weight to some KSAOs over others could not have been shown accurately to select the candidates who are the most qualified for the job.[7] Numerous federal courts have likewise held that tests that measure relevant job skills without appropriate consideration for, and weighting of, their relative importance cannot properly be validated.[8]

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[7] *See, e.g., Principles* at 23-25 (explaining that selection procedures should adequately cover the requisite KSAOs and that the sample of KSAOs tested should be rationally related to the KSAOs needed to perform the work); Lynn Lyons Morris et al., *How to Measure Performance and Use Tests* 99 (1987) (explaining that a content-valid test should include a representative sample of categories of KSAOs and "give *emphasis* to each category according to its importance"); Robert D. Gatewood & Hubert S. Feild, *Human Resource Selection* 178-80 (5th ed. 2001) ("For our measures to have content validity, . . . their content [must] representatively sample[] the content of [the relevant performance] domains.").

[8] *See, e.g., Isabel v. City of Memphis*, No. 01-2533 ML/BRE, 2003 WL 23849732, at *5 (W.D. Tenn. Feb. 21, 2003) ("[T]he test developer must demonstrate that those tests utilized in the selection system appropriately weigh the [KSAOs] to the same extent they are required on the job."), *aff'd*, 404 F.3d 404 (6th Cir. 2005); *Pina v. City of East Providence*, 492 F. Supp. 1240, 1246 (D.R.I. 1980) (invalidating a ranking system for firefighters that gave equal weight to written and physical components of the exam, on the ground that the physical component

The NHFD exams in this case failed that basic principle because the predetermined, arbitrary 60/40 weighting used to calculate the candidates' combined scores was in no way linked to the relative importance of "work behaviors, activities, and/or worker KSAOs," as required for validation. *Principles* at 25. The 60/40 weighting was determined in advance by the City's collective bargaining agreement with the local firefighters' union. *See* Pet. App. 606a (Legel Dep.). While it is not uncommon for municipal governments such as the City to enter into labor or other agreements that provide for a specified weighting of test components, such provisions undermine the validity of the resulting tests unless measures are taken by the test designer to account for the preset weighting.

Here, IOS concededly made no effort to establish that the 60/40 weighting was appropriate for the tests it designed. IOS should have used established methods to calculate whether, in light of the mandatory 60/40 weighting, the test components measured the job-relevant KSAOs in proportion to their relative importance. *See, e.g.*, Murtagh at 161; Gatewood & Feild at 178. IOS apparently did not do so; instead, it merely assessed whether the test questions were related to relevant aspects of the job, with no regard to whether the items included on the test proportionally measured the critical aspects of the overall job.

"appear[ed] to have a greater relationship to job performance as a firefighter"); *Jones v. New York City Human Res. Admin.*, 391 F. Supp. 1064, 1079 n.15, 1081 (S.D.N.Y. 1975) (calling it a "serious defect" not to examine "how or why the skills in the test plan were weighted as they were," resulting in a test that could not be validated; for example, numerous questions related to a skill, supervision, that only 60%-65% of employees in the position actually performed), *aff'd*, 528 F.2d 696 (2d Cir. 1976).

See Pet. App. 634a (Legel Dep.). IOS's failure to take that step resulted in tests that, absent sheer luck, could not have resulted in adequate validity evidence under the *Principles* or the *Uniform Guidelines*.

Moreover, there is no indication that the 60/40 weighting at issue in this case, which gave predominance to the multiple-choice component of the exams, was appropriate for the relevant job. It is well-recognized by I/O psychologists and firefighters alike that written, pencil-and-paper tests, while able to measure certain cognitive abilities (*e.g.*, reading and memorization) and factual knowledge, do not measure other skills and abilities critical to being an effective fire officer as well as alternative methods of testing do. *See, e.g.*, Michael A. Terpak, *Assessment Center: Strategy and Tactics* 1 (2008) (multiple-choice exams are "known to be poor at measuring the knowledge and abilities of the candidate, most notably that of a fire officer"); Int'l Ass'n of Fire Chiefs et al., *Fire Officer: Principles and Practice* 28 (2006) (describing the criticism of written tests as producing firefighters who are "[b]ook smart, street dumb"); *see also* David L. Bullins, *Leading in the Gray Area*, Fire Chief (Aug. 10, 2006) ("Good leadership is not a matter of decisions made in black and white; it is a matter of the decisions that must be made in shades of gray."), *at* http://firechief.com/management/bullins_gray08102006/index.html. Although a written component often properly comprises part of the overall assessment procedure for fire officers, a weighting of 60% is significantly above what would be expected given the requirements of the positions. *See* Phillip E. Lowry, *A Survey of the Assessment Center Process in the Public Sector*, 25 Pub. Personnel Mgmt. 307, 309 (1996) (survey finding that the median weight given

to written portion of test for fire and police departments was 30%); *infra* p. 26 (describing weights used by neighboring Bridgeport).

The *Uniform Guidelines* and the federal courts have similarly recognized that written tests do not correspond well to the skills and abilities actually required for the job of a fire officer and are thus poor predictors of which candidates will make successful fire lieutenants and captains. The EEOC's interpretive guidance on the *Uniform Guidelines*[9] states that "[p]aper-and-pencil tests of . . . ability to function properly under danger (*e.g.*, firefighters) generally are not close enough approximations of work behaviors to show content validity." *Questions and Answers* No. 78, 44 Fed. Reg. at 12,007.

The Eighth and Eleventh Circuits have reached the same conclusion. In *FIRE II*, the Eighth Circuit rejected the validity of a multiple-choice test for promotion to fire captain, on the ground that "[t]he captain's job does not depend on the efficient exercise of extensive reading or writing skills, the comprehension of the peculiar logic of multiple choice questions, or excellence in any of the other skills associated with outstanding performance on a written multiple choice test." 616 F.2d at 357. "'Where the content

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[9] The EEOC's interpretive "questions and answers" were adopted by the four agencies that promulgated the *Uniform Guidelines* in order to "interpret and clarify, but not to modify," those *Guidelines*. *Adoption of Questions and Answers To Clarify and Provide a Common Interpretation of the Uniform Guidelines on Employee Selection Procedures*, 44 Fed. Reg. 11,996, 11,996 (1979) ("*Questions and Answers*"). Like the *Uniform Guidelines* themselves, the agency interpretations have been given great deference by the courts. *See, e.g., Firefighters Inst. for Racial Equality v. City of St. Louis*, 616 F.2d 350, 358 n.15 (8th Cir. 1980) ("*FIRE II*").

and context of the selection procedures are unlike those of the job, as, for example, in many paper-and-pencil job knowledge tests, it is difficult to infer an association between levels of performance on the procedure and on the job.'" *Id.* at 358 (quoting *Questions and Answers* No. 62, 44 Fed. Reg. at 12,005). Accordingly, "[b]ecause of the dissimilarity between the work situation and the multiple choice procedure," the court found that "greater evidence of validity [wa]s required." *Id.* at 357.

In *Nash v. Consolidated City of Jacksonville*, 837 F.2d 1534 (11th Cir. 1988), *vacated and remanded*, 490 U.S. 1103 (1989), *opinion reinstated on remand*, 905 F.2d 355 (11th Cir. 1990), the Eleventh Circuit likewise rejected the use of a written test to determine eligibility for promotion to the position of fire lieutenant. The court rejected the use of the test even though the test questions "never made their way into evidence" and even though the expert who was challenging the use of the test on behalf of the firefighter had never seen the questions. *Id.* at 1536. As the court explained, "[a]n officer's job in a fire department involves 'complex behaviors, good interpersonal skills, the ability to make decisions under tremendous pressure, and a host of other abilities – none of which is easily measured by a written, multiple choice test.'" *Id.* at 1538 (quoting *FIRE II*, 616 F.2d at 359).

IOS exacerbated the problem of imbalance in its response to another predetermined feature of the NHFD exams – the 70% cutoff score mandated by the City's civil service rules. Like the 60/40 weighting, the 70% cutoff score was arbitrary and not scientifically validated. *See* Pet. App. 697a-698a (concession by Mr. Legel that IOS was unable to validate the

70% cutoff score).[10] IOS not only "went ahead and used [the] seventy percent," but also decided to make the written component of the test "more difficult" in an effort to screen out "a fair amount more number [sic] of people . . . than what other tests have done in the past." *Id.* at 698a-699a (Legel Dep.). Not only did this admittedly worsen the adverse impact of the tests on minority candidates, *see infra* Part II.A, but it also skewed the focus of the test even more heavily in the direction of the limited and more attenuated set of knowledge and abilities that are measured by a multiple-choice test, by giving that component unjustifiably greater weight in the composite scores. That, in turn, further reduced the likelihood that the exams could have been shown to be valid.[11]

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[10] Arbitrary cutoff scores alone can undermine a test's validity. *See, e.g., Isabel v. City of Memphis*, 404 F.3d 404, 413 (6th Cir. 2005) (stating that, "[t]o validate a cutoff score, the inference must be drawn that the cutoff score measures minimal qualifications"); *accord Chisholm v. United States Postal Serv.*, 516 F. Supp. 810, 832, 838 (W.D.N.C. 1980), *aff'd in relevant part*, 665 F.2d 482 (4th Cir. 1981). The *Uniform Guidelines* and the *Principles* clearly require cutoff scores, if they are used, to be based on scientifically accepted principles. *See* 29 C.F.R. § 1607.5(H) ("Where cutoff scores are used, they should normally be set so as to be reasonable and consistent with normal expectations of acceptable proficiency within the work force."); *Principles* at 47 (explaining that "[p]rofessional judgment is necessary in setting any cutoff score" in light of factors including "the [KSAOs] required by the work"); *see also* Wayne F. Cascio & Herman Aguinis, *Test Development and Use: New Twists on Old Questions*, 44 Human Res. Mgmt. 219, 227 (2005) (discussing appropriate process for calibrating cutoff score to minimum proficiency for the job).

[11] In fact, IOS acknowledged that even the oral portion of the test was designed, at least "to a small degree," to test factual knowledge, thus further skewing the balance of the test. Pet. App. 709a (Legel Dep.).

Under established principles in the field of I/O psychology and longstanding legal authorities, the NHFD exams were deficient because of IOS's failure to substantiate the predetermined 60/40 weighting before administering the test and because of the resulting overemphasis given to the written, multiple-choice component of the exams, which has been demonstrated to be a relatively poor method for measuring whether a candidate has the KSAOs needed to be a fire officer.

3. Flaws in the Exam-Development Process Contributed to the Lack of Validity Evidence of the NHFD Tests

The process used to develop and finalize the tests further undermined the tests' validity as a method for identifying the individuals best suited for promotion. IOS personnel wrote the test questions based on the information developed from job analysis questionnaires given to incumbent New Haven fire officers and "national texts" on firefighting. C.A. App. 478 (Legel Dep.). However, IOS personnel were not themselves subject-matter experts on the job of a fire company officer, nor were the "national texts" they used tailored to the NHFD's specific practices or local conditions in New Haven. *See id.* ("So depending on the way that those [New Haven] City employees are trained to do their specific job, it may not always jibe with the way the textbook says to do it."); *see also* Pet. App. 520a-521a ("Fire fighting is different on the East Coast than it is on [sic] West Coast or in the Midwest.").

Accordingly, as IOS acknowledged, "[s]tandard practice" in the field required that the tests be reviewed by "a *panel* of subject matter experts internal to New Haven, for instance, incumbent lieutenants,

captains, battalion chiefs, [assistant] chiefs, and the like to actually gain [sic] their opinion about how relevant the items were and whether or not they were consistent with best practice in New Haven." *Id.* at 635a (Legel Dep.) (emphasis added). Review by multiple persons with specific expertise about the NHFD was, as IOS recognized, important to verify that the questions accurately reflected important KSAOs of the job and, especially, local differences between NHFD's practices and procedures and national firefighting standards. *See* Wayne F. Cascio & Herman Aguinis, *Applied Psychology in Human Resource Management* 158-59 (6th ed. 2005) (documenting the need for subject-matter experts to "confirm[] the fairness of sampling and scoring procedures" and to evaluate "overlap between the test and the job performance domain"); Irwin L. Goldstein et al., *An Exploration of the Job Analysis–Content Validity Process, in Personnel Selection in Organizations* 3, 20-21 (Neil Schmitt & Walter C. Borman eds., 1993); Int'l Ass'n of Fire Chiefs et al., *Fundamentals of Fire Fighter Skills* 103, 431, 663 (2004) (emphasizing that firefighters need to become "intimately familiar" with local procedures and local differences affecting firefighting such as architectural styles).

Rather than follow this admittedly standard procedure, IOS hired a single individual, a battalion chief in a fire department in Georgia, to review the tests for the job-relatedness of their content. *See* Pet. App. 635a-636a (Legel Dep.). Unsurprisingly, due to the failure to conduct a proper review by multiple subject-matter experts on local practice, IOS admitted that some of the items on the tests were "irrelevant for the City because you're testing them on a knowledge base that while supported by a national textbook,

wouldn't be supported by their own standard operating procedures." C.A. App. 482 (Legel Dep.). For example, the lieutenants' test included a question from a New York-based textbook about whether fire equipment should be parked uptown, downtown, or underground when arriving at a fire. JA48. The question was meaningless because New Haven has no "uptown" or "downtown."

By IOS's admission, and under applicable I/O psychology standards, review of the test items by local subject-matter experts was critical to ensuring that the test components corresponded to the important job KSAOs. The failure to do so further undermined the validity of the NHFD exams as indicators of which candidates would have made successful NHFD fire lieutenants or captains.

4. The NHFD Tests Could Not Have Been Validated for Strict Rank-Ordering of Candidates

Under accepted standards, not only must an exam's content be properly validated, but the use of the scores also must be scientifically justified. As the *Uniform Guidelines* state, "the use of a selection procedure on a pass/fail (screening) basis may be insufficient to support the use of the same procedure on a ranking basis under these guidelines." 29 C.F.R. § 1607.5(G). Under the *Uniform Guidelines*, a strict rank-ordering system such as the one imposed by the City – *i.e.*, treating a candidate as "better qualified" based on even a slight incremental difference in score – is only appropriate upon a scientific showing "that a higher score on a content valid selection procedure is likely to result in better job performance." *Id.* § 1607.14(C)(9). As the Second Circuit held in *Guardians Association of New York City Police Department*

v. Civil Service Commission, 630 F.2d 79 (2d Cir. 1980), "[p]ermissible use of rank-ordering requires a demonstration of such substantial test validity that it is reasonable to expect one- or two-point differences in scores to reflect differences in job performance." *Id.* at 100-01 (rejecting the validity of rank-ordering); *see also FIRE II*, 616 F.2d at 358.

In this case, the NHFD tests could not have supported the use of a strict rank-ordering procedure for promotional selection. Indeed, the tests were designed and administered at a time when New Haven's "Rule of Three" had been interpreted to permit rounding of scores to the nearest integer, rather than strict rank-ordering based on differences of fractions of a point. *See* C.A. App. 1701; *Kelly v. City of New Haven*, 881 A.2d 978, 993-94 (Conn. 2005). Use of strict rank-ordering for a test absent evidence demonstrating that it was valid for that purpose cannot be justified. *See Pina*, 492 F. Supp. at 1246 (invalidating test where "[t]here [wa]s no evidence which even remotely suggest[ed] that the order of ranking establishe[d] that any applicant [wa]s better qualified than any other").

Moreover, as explained above, the serious flaws in the NHFD tests severely undermined the overall validity of the exams and certainly foreclosed any conclusion that the exams were of such "substantial . . . validity" as to justify the additional step of making promotional decisions strictly based on small score differences. *Guardians Ass'n*, 630 F.2d at 100-01. Making fine judgments based on small differences on fundamentally flawed tests is scientifically unsupportable. *See, e.g.*, Aguinis & Harden at 193. "[U]se of an exam to rank applicants, when the exam cannot predict applicants' relative merits, offers

nothing but a false sense of assurance based on a misplaced belief that *some* criterion – no matter how arbitrary – is better than none." *Ensley Branch, NAACP v. Seibels*, 31 F.3d 1548, 1574 (11th Cir. 1994).

Tests that transform differences that are as likely to be a product of measurement error or flawed test design as they are a reflection of superior qualifications create nothing but the illusion of meritocracy. That illusion creates not only a false sense of individual entitlement to jobs and promotions, but also a real public danger in the context of positions such as fire and police officers. When the safety and lives of citizens are at stake, it is particularly critical for public employers to have the leeway to ensure that the tests they deploy accurately identify those candidates who are most qualified for these important jobs.

II. THE FLAWS IN THE NHFD PROMOTIONAL EXAMS EXACERBATED THEIR ADVERSE IMPACT ON MINORITY CANDIDATES

Unjustified exclusion of minority candidates through scientifically flawed testing procedures has significant social costs. Especially in a city like New Haven, racial diversity has significant benefits to the ability of the public sector to provide needed services to the community and to protect the public safety. *See, e.g.*, Wayne F. Cascio et al., *Social and Technical Issues in Staffing Decisions, in Test Score Banding, in Human Resource Selection* 7, 9 (Herman Aguinis ed., 2004). An all-white officer corps in the NHFD will be less effective than one that is more racially diverse. *See id.*; *see also* Sargent at 188 (noting that having a Hispanic firefighter fluent in Spanish "can be a life saver").

In this case, the flaws in the NHFD promotional exams not only undermined their validity, but also unjustifiably increased their adverse impact on minority candidates. In particular, two features of the tests contributed to the conceded adverse impact on African-American and Hispanic examinees. Tests that eliminated these features were available to the City as "less discriminatory alternatives" under Title VII.

A. Overweighting Of The Written, Multiple-Choice Portion Of The Exams Increased The Adverse Impact On Minority Candidates

It is well-established that minority candidates fare less well than their Caucasian counterparts on standardized written examinations, and especially multiple-choice (as opposed to "write-in") tests. *See, e.g.*, Winfred Arthur Jr. et al., *Multiple-Choice and Constructed Response Tests of Ability*, 55 Personnel Psychol. 985, 986 (2002); Philip L. Roth et al., *Ethnic Group Differences in Cognitive Ability in Employment and Educational Settings: A Meta-Analysis*, 54 Personnel Psychol. 297 (2001). Although the causes for that widely recognized discrepancy are not fully understood, certain features of the multiple-choice format have been recognized to contribute to adverse impact.

First, "[t]o the extent that [the exam's] reading demands are not concomitant with job demands and/or performance, then any variance associated with reading demands and comprehension is considered to be error variance." Arthur et al., 55 Personnel Psychol. at 991. Some studies suggest disparities among racial subgroups in reading comprehension, such that using written questions and answers as

the sole or predominant medium for testing increases adverse impact. *See id.*; James L. Outtz & Daniel A. Newman, *A Theory of Adverse Impact* 12-13, 68 (manuscript on file with author) (forthcoming in *Adverse Impact: Implications for Organizational Staffing and High Stakes Selection*, 2009). Moreover, studies suggest that racial minorities are less "test wise" than white test-takers, and it is "widely recognized that performance on multiple-choice tests is susceptible to specific test-taking strategies or test-wiseness." Arthur et al., 55 Personnel Psychol. at 991-92. Finally, studies have found that a test-taker's unfavorable view of a test's validity negatively influences performance, and some evidence indicates that minority test-takers generally have a less favorable view of traditional written tests. *See id.* at 992.

Regardless of the exact cause of the disparity, it is clear that the use of written, multiple-choice tests beyond what is justified by the demands of a particular job has the effect of disproportionately excluding minority candidates without any corresponding increase in job performance. *See, e.g.*, Outtz & Newman at 33. As set forth above, the NHFD's 60/40 weighting was arbitrary and put more emphasis on the written, multiple-choice examination than science and experience have shown to be warranted for the job of a fire officer. Likewise, the response of IOS to the 70% cutoff score contributed to the adverse impact of the exams. By IOS's own admission, arbitrarily making the written portion of the tests "more difficult" further exaggerated the importance of the written component and thereby contributed to the exclusion of African-American and Hispanic candi-

dates from the promotional ranks. Pet. App. 698a-699a (Legel Dep.).

Changing the weighting of the exams to more accurately reflect the content of the job almost certainly would have reduced their adverse impact by reducing the weight of the written component, and thus constituted a "less discriminatory alternative" that the City would have been obligated to use under Title VII. Had the City given a 30% weighting to the written component of the examination, more in line with the nationwide norm, *see supra* pp. 15-16, the tests would have had a significantly lower adverse impact on minority candidates. *See* Resp. Br. 33 ("[I]f the tests were weighted 70%/30% oral/written, then two African-Americans would have been considered for lieutenant positions and one for a captain position."). Indeed, 20 miles down the coast from New Haven, the fire department in Bridgeport, Connecticut, has administered tests with less weight given to the written component (25% for lieutenants and 33% for captains) and achieved a significant reduction in adverse impact relative to the NHFD exam results. *See* JA64-66.[12]

B. Selection Of Candidates In Strict Rank Order Also Contributed To Adverse Impact

As discussed above, the NHFD tests were improperly weighted toward the written component, which tested certain KSAOs (*e.g.*, reading, memorization, and factual knowledge) in disproportion to their im-

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[12] In 2005, the Bridgeport lieutenant's exam consisted of written and oral components, weighted 25% and 75%, respectively; the weights on the captain's exam were 33% for the written component, 62% for the oral component, and 5% for seniority.

portance relative to other important skills and abilities, including "command presence," which was not measured at all. Moreover, the tests unjustifiably employed a strict rank-ordering system that differentiated among candidates based on small score differences that had not been scientifically demonstrated to be meaningful. The combination of imbalanced weighting toward KSAOs that disproportionately disfavor minority candidates and the selection of candidates based strictly on rank order cemented the disproportionate rejection of minority candidates for promotion.

An alternative to strict rank-ordering would have been a "banding" scoring system. In brief, banding involves use of statistical analysis of the amount of error in the test scores to create "bands" of scores, the lowest of which is considered to be sufficiently similar to the highest to warrant equal consideration within that band. Cascio et al. at 10; *see also Principles* at 48 (bands "take into account the imprecision of selection procedure scores and their inferences"). After the width of the band is established, based on a statistical analysis of the reliability of measurement, the user can either establish "fixed" bands, in which the test user considers everyone within the top band before considering anyone from the next band, or "sliding" bands, which allows the band to "slide" down the list once higher scorers are either chosen or rejected. *See* Cascio et al. at 10-11.

The federal courts have recognized banding as "a universal and normally an unquestioned method of simplifying scoring by eliminating meaningless gradations" between candidates whose scores differ by less than the degree of measurement error. *Chicago Firefighters Local 2 v. City of Chicago*, 249 F.3d 649,

656 (7th Cir. 2001); *see also, e.g., Biondo v. City of Chicago*, 382 F.3d 680, 684 (7th Cir. 2004) (banding "respect[s] the limits of [an] exam's accuracy"). In *amici*'s view, a banding approach would have been a viable method to reduce the adverse impact of the NHFD tests. However, given that the rankings themselves were a result of flawed tests, banding alone would not have been sufficient to achieve the objective of selecting the most qualified individuals for the job. *See Bridgeport Guardians, Inc. v. City of Bridgeport*, 933 F.2d 1140, 1147 (2d Cir. 1991) ("The ranking of the candidates was itself the result of the disparate impact of the examination.").

III. CURRENT I/O PSYCHOLOGY RESEARCH SUPPORTS THE USE OF PROMOTIONAL ASSESSMENT CENTERS AS A VALID AND LESS DISCRIMINATORY ALTERNATIVE TO TRADITIONAL TESTING METHODS

The evidence in the record clearly demonstrates that the NHFD exams suffered from fatal design defects that undermined their validity and unjustifiably excluded a disproportionate number of minority candidates. That alone left the City no choice but to decline to certify the exams. In addition, the City reasonably concluded that certification of the tests could not be justified given the existence of alternative methods of selection. One alternative before the City was the assessment center, which, if designed properly, would measure a broader range of KSAOs and also be less discriminatory. *See, e.g.*, JA96 (statement of Dr. Christopher Hornick to the Board that assessment centers are "much more valid in terms of identifying the best potential supervisors"); Pet. App. 739a (Legel Dep.).

A. History Of The Assessment Center Model

From the 1950s to the 1980s, multiple-choice tests were generally the only procedure used for promotional selection in U.S. fire departments. *See* Int'l Ass'n of Fire Chiefs et al., *Fire Officer: Principles and Practice* at 28. Such tests were prevalent because they were easy and inexpensive to administer, and seemingly "objective." However, for the reasons discussed above, such tests had the side-effect of excluding a disproportionate number of minority candidates from consideration. Beginning in the 1970s, spurred in part by the passage of Title VII (1964), the development of the *Uniform Guidelines* (1966), and this Court's decision in *Griggs* (1971), employers increasingly began using an alternative selection method known as the assessment center. *See* James R. Huck & Douglas W. Bray, *Management Assessment Center Evaluations and Subsequent Job Performance of White and Black Females*, 29 Personnel Psychol. 13, 13-14 (1976).

An assessment center is a form of standardized evaluation that seeks to test multiple dimensions of job qualification through observation of job-related exercises and other assessment techniques. *See generally* Task Force on Assessment Center Guidelines, *Guidelines and Ethical Considerations for Assessment Center Operations*, 18 Pub. Personnel Mgmt. 457, 460-64 (1989) (defining an assessment center). Unlike multiple-choice exams, which evaluate KSAOs through a single, written medium, assessment centers employ multiple methods, including, prominently, job simulations, all of which are designed to permit more direct assessment of ability to do the job. *See id.* at 461-62. Candidates' performance on the simulation exercises is rated by multiple subject-matter

experts. *See id.* at 462. By observing how a participant handles the problems and challenges of the target job (as simulated in the exercises), assessors develop a valid picture of how that person would perform in the target position. *See* Charles D. Hale, *The Assessment Center Handbook for Police and Fire Personnel* 16-52 (2d ed. 2004) (describing typical exercises).

B. Assessment Centers Have Demonstrated Validity In The Context Of Firefighter Promotion

Since the 1970s, the use of assessment centers for employee selection has increased rapidly, both in the United States and elsewhere, and in firefighter promotion in particular. By 1986, 44% of fire departments surveyed used assessment centers in making promotion decisions.[13] More recent surveys indicate a usage rate of between 60% and 70%.[14]

Like any testing method, an assessment center must be properly constructed so that, for example, it measures important KSAOs of the relevant job. After more than 30 years of use and research, however, substantial agreement exists among I/O psychologists that properly designed assessment centers are better predictors of job performance than other

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[13] *See* Samuel J. Yeager, *Use of Assessment Centers by Metropolitan Fire Departments in North America*, 15 Pub. Personnel Mgmt. 51, 52-53 (1986); *accord* Miguel Roig & Maryellen Reardon, *A Performance Standard for Promotions*, 141 Fire Engineering 49, 49 (1988).

[14] *See* Lowry, 25 Pub. Personnel Mgmt. at 310; Carl F. Weaver, *Can Assessment Centers Eliminate Challenges to the Promotional Process?* 13 (July 2000) (unpublished monograph), *at* http://www.usfa.dhs.gov/pdf/efop/efo24862.pdf.

forms of promotional testing.[15] Today, because of numerous studies supporting the conclusion, "the predictive validity of [assessment centers] is now largely assumed." Walter C. Borman et al., *Personnel Selection*, 48 Ann. Rev. Psychol. 299, 313 (1997). Properly designed assessment centers have incremental predictive validity over cognitive tests "because occupational success is not only a function of a person's cognitive abilities, but also the *manifestation* of those abilities in concrete observable behavior." Diana E. Krause et al., *Incremental Validity of Assessment Center Ratings Over Cognitive Ability Tests: A Study at the Executive Management Level*, 14 Int'l J. Selection & Assessment 360, 362 (2006).

As reflected by their widespread usage by fire departments across the country, assessment centers are especially appropriate in the context of firefighter promotion. Because they use multiple methods of assessment, assessment centers are able to measure a wider range of skills, including critical skills such as leadership capacity, problem-solving, and "command presence." IOS's representative, Chad Legel, admitted that the NHFD tests failed to test for "command presence," and he further acknowledged that the City "would probably be better off with an assessment center if you cared to measure that." Pet. App. 738a (Legel Dep.); *see also* Krause et al., 14 Int'l J. Selection & Assessment at 362 (agreeing that leadership ability is likely better assessed through an

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[15] *See, e.g.*, Chaitra M. Hardison & Paul R. Sackett, *Assessment Center Criterion Related Validity: A Meta-Analytic Update* 14-20 (2004) (unpublished manuscript); Winfred Arthur Jr. et al., *A Meta-Analysis of the Criterion-Related Validity of Assessment Center Dimensions*, 56 Personnel Psychol. 125, 145-46 (2003); Barbara B. Gaugler et al., *Meta-Analysis of Assessment Center Validity*, 72 J. Applied Psychol. 493, 503 (1987).

assessment center than an oral interview); Gaugler et al., 72 J. Applied Psychol. at 493 ("assessment centers are most frequently used for assessing managers").

In short, the "state of the art" in the field of promotional testing for firefighters and the "state of the science" in I/O psychology have evolved beyond the outdated methods of testing used by the NHFD. Instead, as the City was told by Dr. Hornick, *see* JA96, there is now substantial agreement that a professionally validated assessment center represents a more effective method of selecting the most qualified fire officers.

C. Assessment Centers Have Been Proven To Reduce Adverse Impact On Minorities

It is equally well-recognized in the research literature that assessment centers reduce adverse impact on racial minorities as compared to traditional standardized tests. *See, e.g.*, George C. Thornton & Deborah E. Rupp, *Assessment Centers in Human Resource Management* 231 (2006). "Additional research has demonstrated that adverse impact is less of a problem in an assessment center as compared to an aptitude test designed to assess cognitive abilities that are important for the successful performance of work behaviors in professional occupations." Cascio & Aguinis, *Applied Psychology in Human Resource Management* at 372-73.

Those scientific studies also have been borne out by experience. An analysis of fire-personnel selection in St. Louis in the 15 years after the *FIRE II* decision found that the institution of an assessment center selection method "achieved considerable success at minimizing adverse impact against black candidates." Gary M. Gebhart et al., *Fire Service Testing*

in a Litigious Environment: A Case History, 27 Pub. Personnel Mgmt. 447, 453 (1998).

In sum, assessment centers are now a prevalent feature of firefighter promotional tests across the nation. Numerous resources exist for employers wishing to incorporate assessment centers into their selection procedures in accordance with accepted scientific principles.[16] The availability of the assessment center as an equally valid, less discriminatory alternative provides yet another justification for the City's decision not to certify the results of the NHFD promotional exams. Indeed, under Title VII, it compelled that decision.

* * * * *

To place this case in overall perspective, petitioners' lawsuit seeks to compel the City to certify the results of tests that suffered from glaring flaws undermining their validity, had an admitted adverse impact on racial minorities, and could have been replaced by readily available, equally or more valid, and less discriminatory alternatives. From the standpoint of accepted I/O psychology principles, there is no justification for certifying the results of such tests because there is no evidence they selected the most qualified candidates, and they systematically excluded minority candidates. Under established legal principles, moreover, certification would have resulted in a violation of Title VII, and the City's decision was thus compelled by law. Petitioners' challenge to the City's decision must therefore fail.

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[16] *See generally, e.g.*, Ian Taylor, *A Practical Guide to Assessment Centres and Selection Methods* (2007); Hale, *supra*.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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March 25, 2009

Supreme Court, U.S.
FILED
MAR 25 2009
OFFICE OF THE CLERK

No. 07-1428
VIDE 08-328

IN THE
Supreme Court of the United States

FRANK RICCI, ET AL.,
Petitioners,

v.

JOHN DESTEFANO, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICI CURIAE*, INTERNATIONAL ASSOCIATION OF BLACK PROFESSIONAL FIRE FIGHTERS, BLACK CHIEF OFFICERS COMMITTEE, JAMES CLACK, ROCCO FORTE, SHERMAN GEORGE, NED PETTUS, PAUL STUBBS, ROBERT WRIGHT, KYLE BRINK, Ph.D., JEFFREY CRENSHAW, Ph.D., and BRIAN BELLINGER, Ph.D., IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

1. Whether respondents' failure to certify the results of promotional examinations violated the disparate-treatment provision of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a).

2. Whether respondents' failure to certify the results of promotional examinations violated 42 U.S.C. § 2000e-2(l), which makes it unlawful for employers "to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race."

3. Whether respondents' failure to certify the results of promotional examinations violated the Equal Protection Clause of the Fourteenth Amendment.

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STATEMENT OF INTEREST OF AMICI[1]

Amicus International Association of Black Professional Fire Fighters, officially incorporated in 1970 in Hartford, CT, comprises 5,100 professional firefighter members, 200 lifetime members, and 90 local chapters, comprising cities in the U.S., England, Africa, and the Caribbean. The IABPFF seeks to foster interest and assistance in inter-group relations in fire service, including recruitment, hiring and promotion and, in particular, community relations. See http://www.iabpff.org/index2.htm.

Amicus Black Chief Officers Committee was formed in 1986 in Buffalo, NY, and officially incorporated in 2005. It is a premier network representing more than 500 black chief fire and EM officers from the U.S., England, Africa, and the Caribbean; its members have proven leadership and expertise in firefighter service and command. The organization's mission is to enhance black fire executives' ability to better serve the public and the firefighting profession. See http://www.blackchiefofficer.com/BCOC_Brochure-General.pdf.

Amici also comprise a number of distinguished individuals, including:

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[1] Pursuant to Rule 37, letters of consent from the parties have been filed with the Clerk of the Court by letters dated February 12, 2009 and February 23, 2009. In accordance with Rule 37.6, *amici* state that no counsel for either party has authored this brief in whole or in part, and no person or entity, other than *amici*, has made a monetary contribution to the preparation or submission of this brief.

James Clack, Chief of the Baltimore, MD, Fire Department. Chief Clack has been a firefighter since 1986 and served as chief of Minneapolis Fire Department from March, 2006, through April, 2008. During his tenure, Minneapolis was the first large metropolitan city to successfully develop a promotional selection process that integrated blacks, women, and other diverse groups into the officer ranks of the department.

Rocco Forte, Director of Regulatory Service and Emergency Management for the City of Minneapolis, MN. Mr. Forte was chief of Minneapolis Fire Department from July 1998, through June 2005. Under his direction, Minneapolis embarked on its efforts to reform the promotional selection methodology to result in a more diverse officer corps.

Sherman George, former chief of the St. Louis, MO, Fire Department, being the first African-American to attain the rank of chief in that department. He retired in 2007.

Ned Pettus, Chief of the Columbus, OH, Fire Department since 2000. Chief Pettus, the first African-American chief of the Columbus department, has been a career officer and firefighter there, and oversees an increasingly diverse population, including approximately 50,000 Somalis.

Paul Stubbs, Chief of the Cleveland, OH, Division of Fire since 2004. Chief Stubbs, a career firefighter and officer in Cleveland, is the first African-American to serve in that capacity in Cleveland, a city which is over 51% African-American and seeing rapidly increasing diversity in population.

Robert Wright, Chief of the Cincinnati, OH, Fire Department since 1997. Chief Wright is the first African-American officer to serve in such a capacity in that city, as well as being the first black officer at each rank in progression in Cincinnati's fire department.

Kyle Brink, Ph.D., Brian Bellinger, Ph.D., and Jeffrey Crenshaw, Ph.D. industrial organizational psychologists who specialize in safety force testing, centered in Jefferson County, AL. Hired by a federally appointed receiver designated by the U.S. Dist. Court, M.D. AL, Drs. Brink, Bellinger and Crenshaw successfully eliminated written tests altogether for fire promotional examinations while operating under a federal court consent decree, which was dissolved in late 2008.

Amici disagree with Petitioners that strict scrutiny is required in this situation, for reasons set forth in the brief of Respondents and other *amici* for Respondents. Moreover, Respondents did not invoke a goal of diversity per se, but rather a compelling interest in compliance with Title VII. However, Petitioners and their *amici* have argued that diversity is directly at issue and have sought to raise arguments under the Equal Protection Clause on that very basis. The questions presented by the Court also are generally tied to the Equal Protection Clause.

As such, this case will likely have major implications for diversity in fire service in general, and for *amici* in particular, as well as the cities in which they serve.

Amici argue that diversity is a compelling state interest as a matter of national security in fire-service

to meet the changing demands of a changing American population. As such, *amici* have a deep interest in the outcome of this case. They thus join the city of New Haven in seeking affirmance of the lower courts, for the reasons stated *infra*.

SUMMARY OF ARGUMENT

In *Adarand Constructors v. Pena*, 515 U.S. 200, 237 (1995), this Court declared, "[W]e wish to dispel the notion that strict scrutiny is '"strict in theory, but fatal in fact.'[] The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it." Few places show more unhappy persistence of discriminatory practices and attitudes than in the fire service of the United States.

At present, this Court has found compelling state interests in diversity in higher education (*Grutter v. Bollinger*, 539 U.S. 306 (2003)) and past demonstrated or a history of discrimination (*See, e.g., Adarand*, at 237; *United States v. Paradise*, 480 U.S. 149, 166 (1987) (plurality opinion) (finding a compelling interest in remedying past and present discrimination against state troopers)). This Court also has found a compelling state interest in the nation's national security. *Haig v. Agee*, 453 U.S. 280, 307 (1981) ("It is obvious and unarguable that no governmental interest is more compelling than the security of the Nation."). *See, also,* Consolidated Amicus Brief of Lt. Gen. Julius W. Becton, Jr., et al. ("military brief") in *Grutter* (compelling interest in military diversity is fully supported by military and federal government officials).

To date, this Court has reserved the question of whether there is a compelling state interest in diverse local safety forces. See *Paradise*, 480 U.S. at 166. *Amici* argue that day has come. Not only is diversity mandated by Title VII and equal protection in this case, it is also made necessary by (and correlates to) a compelling state interest in promoting and maintaining diversity in our nation's first responders and local fire service, in the interests of national security, particularly at higher ranks.

This, too, is recognized by the distinguished former military and U.S. Senate *amici* in the *Grutter* military brief. Fire service parallels the military in terms of employing a paramilitary ranking system and deploying first responders to serve communities in times of emergency and catastrophe, both on the local and national landscape, as shown *infra*.

While in *Haig*, the Court was concerned with military readiness for war, recent incidents such as 9-11, Oklahoma City, Katrina, the California wildfires have instructed us that readiness is also compelling at the local level, in order to keep the nation, localities, and citizens safe from fires, floods, hurricanes, and other disasters -- both natural and manmade. In current times, this interest is possibly even more compelling, and so is the diversity required to adequately address increasingly diversified population concerns.

And, just as the United States military has recognized a compelling need for integrated forces in both lower ranks and officers, so, too, does the nation's fire services, which protect our country internally, and which share a nearly identical paramilitary structure

of command. The current lack of African-Americans and other minorities in higher ranking positions contributes daily to racial strife within the ranks of fire departments across the country, and threatens the cohesive, organized, and interconnectedness of fire corps needed to battle increasingly volatile needs for military-like readiness for domestic emergencies.

As with the military, fire service has undergone growing pains. For decades in the earlier part of the 20th century, it was strictly dominated by whites in all ranks and, like the military, tended to enjoy (particularly with ranking officers) a peculiar sense of "tradition," of legacies and closed traditions of handing down fire careers from fathers to sons. In the 1960s and 1970s, as more blacks attempted to gain entrance into the fire-fighting profession, numerous attempts were made to close ranks and keep them out. Racism in both hiring and promotion was rampant, as attested to by the numerous cases filed and consent decree judgments entered by courts during the late 1960s through the 1980s. These decrees had to take race into account to overcome the decades of racial discrimination and segregation, vestiges of which still linger in the fire service today.

Today in this country, there are approximately 323,000 career firefighters. As the decrees have expired, the percentage of professional black firefighters in the United States has drastically declined by nearly half, as shown *infra*. This is due in part to a large drop in minority hiring. Moreover, those hired under the desegregating consent decrees of the 1970s and 1980s are at or near the retirement stage of their careers. The implications for the future of a diverse firefighting force are ominous, particularly in

the face of a nationally recognized, changing face of America and increasing need for diversity in homeland security and protection, particularly at the command levels.

Other forces also are diminishing the diversity of America's fire service, particularly in the vital area of commanding ranks. Although many fire departments continue to utilize so-called "job knowledge" tests for hiring and especially promotion, it is widely known and accepted that cognitive examinations, such as used here, have a demonstrated adverse impact on blacks and other minorities. As the record and other empirical evidence show, there are known alternative measures of equal validity with less discriminatory impact on African-Americans and other minorities. Further, Petitioners have pointed to no studies showing that firefighting has "suffered" since blacks began being hired or promoted. Indeed, at the height of the consent decree hirings in the 1970s and 1980s, fire deaths actually diminished. See *America Burning Revisited* (1987), *available at* http://www.usfa.dhs.gov/applications/publications/display.cfm?it=5-0133.

Moreover, despite claims to the contrary by Petitioners, the tests at issue were not conclusively "valid" or "validated." There is no evidence that any of the candidates was more qualified than another. The tests also had a clear adverse impact on blacks in New Haven's fire service. New Haven's decision not to certify the examinations in anticipation of instituting more accurate, less-discriminatory alternative measures did not intentionally classify or disfavor individuals because of their race.

Faced with admitted adverse impact, there was no better method available to New Haven to avoid adverse impact than non-certification of the exams at issue. This was also important to avoid further eroding the diversity of the New Haven department and fire service, particularly where it is most needed: in the upper ranks. In light of the compelling state interest in a nationally diverse fire service, and the dearth of viable alternatives, New Haven's one-time act was constitutionally legitimate.

ARGUMENT

THERE IS A COMPELLING STATE INTEREST IN PROMOTING AND PRESERVING DIVERSITY IN OUR NATION'S FIRE SERVICE

Since 9-11, the United States has explicitly recognized that firefighters meet a compelling need as "first responders" in emergencies, and that the local firefighters are the bulwark of readiness for emergencies, prevention, and community public safety. This is reflected, in part, by the fact that the United States Fire Administration ("USFA") is now part of the Department of Homeland Security, falling directly under the auspices of the Federal Emergency Management Administration ("FEMA"). See http://www.usfa.dhs.gov/about/ ("As an entity of the Department of Homeland Security's Federal Emergency Management Agency, the mission of the USFA is to foster a solid foundation in prevention, preparedness, and response by providing national leadership to local fire and emergency services.").

Indeed, the term "firefighter" is actually somewhat of a misnomer in today's environment. While firefighting remains an important aspect of the job, over the past twenty-five years firefighting has evolved into what is more accurately described as "first responders." See http://www.fema.gov/hazard/dproc.shtm ("**First Response** to a disaster is the job of local government's emergency services with help from nearby municipalities, the state and volunteer agencies. In a catastrophic disaster, and if the governor requests, federal resources can be mobilized through the U.S. Department of Homeland Security's Federal Emergency Management Agency [] for search and rescue, electrical power, food, water, shelter and other basic human needs.") (emphasis in original).

In March 2009, the United States reinforced its strong commitment to firefighters as "partners" with Homeland Security and as the "face of Homeland Security." Janet Napolitano, Homeland Security Secretary, in a speech delivered to members of the International Association of Firefighters (IAFF), declared:

> As you know, FEMA is not a first responder. You are the first responders.... FEMA's job is to support you and to support you in a number of ways, by providing grants, training, equipment, exercises, by helping coordinate disaster planning across the country, including pre-disaster planning; and to assist in post-disaster recovery. But it is really our firefighters, our police; those are the individuals that show up at the door on the day, the hour of a disaster, the day after, and the like. And when a city or

> locality needs assistance, the state comes in and then FEMA is there to back it up.

Janet Napolitano, Homeland Security Secretary, Remarks to the International Association of Fire Fighters in Washington, D.C. (March 16, 2009), *available at* http://www.dhs.gov/ynews/speeches/sp_1237294788434.shtm.

First response, in other words, is national in scope at local levels. However, the United States also regards local first response to *local emergencies* as a national compelling interest. As noted by the USFA: "The United States has a severe fire problem, more so than is generally perceived. Nationally, there are millions of fires, tens of thousands of injuries, and billions of dollars lost – which makes the U.S. fire problem one of great national importance." U.S. Fire Administration, *Fire in the United States 1995-2004* (14th ed. 2007), p. 35, *available at* http://www.usfa.dhs.gov/statistics/reports/fius.shtm.

As increasing chaotic weather contributes to wildfires, flooding and other issues facing individual communities, such first responders increasingly grow in importance. For example, FEMA now gives cities and communities federal dollars for emergency management, and also trains first responders for deployment to other areas in need. FEMA also subsidizes many cities via funding and first responder training through grants ("SAFER") for community education and prevention.

Not only is recovery compelling; equally compelling is fire and emergency prevention and education in local communities. As noted by James Witt, then-

Director of FEMA, in his forward to *America at Risk, America Burning Recommissioned* (2002):

> Our community fire departments and firefighters are at the vanguard of the long-term effort to address our fire risks. Not only are they the first responders to fire and other natural and man-made disasters, but also they have been strong advocates of effective codes and standards; they visited our schools and neighborhoods with educational material on fire risks, and they have put their lives on the line countless times. They will continue to do so. There is ample proof that the word hero is a correct attribute of our Nation's firefighters.

Id. at http://www.usfa.dhs.gov/downloads/pdf/publications/fa-223-508.pdf.

Moreover, fires do not comprise the lone subject of the job of the professional firefighter. Today, only 6% of our nation's firefighter emergency runs are actual fire runs. NFPA, NFPA, *The U.S. Fire Service*, "Fire Department Calls," *available at* http://www.nfpa.org (select "Research," select "Fire statistics" under "Research," select "The U.S. fire service," select "Fire Department Calls"). Indeed, the largest single component of response runs of fire departments is emergency medical runs, which have increased threefold since 1980 and currently comprise in excess of 62% of the response runs today. *Id.* Most urban departments (and 59% of all fire U.S. departments) have emergency medical response units, as well as hazardous materials units and rescue squads, all requiring specialized training in non-firefighting techniques.

It is universally recognized that cities, such as New Haven, operate not just as "public employers" in this regard, but also as providers of vital public services, owned by the public and funded also in part by the federal government. Thus, firefighting serves a tripartite interest: cities as employers, firefighters as employees/first responders, and the communities served by them. Public trust and safety are vital to the nation's interest, as are cohesive and diverse officer and firefighter corps.

Moreover, as argued *infra,* the concept of "community" is an inherent part of the need for diversity in our firefighting forces. Numerous studies and statistics have shown that, as communities become more diverse, the need for diversified ability to serve them becomes apparent, as does the need for internally diverse and cohesive firefighting forces in our nation's cities, which is currently sorely lacking.

1. Diversity Is Necessary for Adequate Community Service, Cohesiveness and Command in the Fire Services.

American cities are reflecting rapidly changing demographics. Our country is becoming more diverse even faster than projected just a few years ago. Current estimates by the U.S. Census Bureau predict that no racial group will be in a "majority" by 2042, and non-white groups are projected to constitute roughly 54% of the overall population by 2050. http://www.census.gov/Press-Release. Indeed, the states of California and Texas already have reached similar levels. See U.S. Census Bureau, http://www.quickfacts/census.gov/qfd/states).

As in the military, in the fire service trust and communication are essential to performing the functions of first responders. This is true for not only emergency response situations, but in the education and community service aspects of the first responder functions, as well.

It is particularly imperative in culturally diverse communities, where occupants often share an innate fear of persons in uniform and exhibit more trust if the person shares some cultural characteristics of their own. *See, e.g.*, Lawrence W. Sherman, et al., *U.S. Department of Justice, Preventing Crime: What Works, What Doesn't, What's Promising*, 8-26 (1997); David L. Altheied, *Terrorism and the Politics of Fear* (2006) (citing scholarly research on the connection of uniforms, social control, and the community distrust and fear); FBI Law Enforcement Bulletin (2001) ("clothing [particularly uniforms] has a powerful impact on how people perceive each other").

Succinctly stated, in responding to any emergency, it matters who enters the building, it matters who does the talking and it matters as to what they say, how they will be understood. Context is essential. So is the ability to command a diverse and cohesive force – the true meaning of "merit." See *America at Risk: America Burning Recommissioned 2002*, http://www.usfa.dhs.gov/downloads/pdf/publications/fa-223-508.pdf., Finding #11, page 29 ("There is still much to be done in building diversity into the service's organizational structure and the agenda of the emergency services.... Much of the strength of the fire and emergency services derives from their acceptance by the communities and neighborhoods they serve. This strength is enhanced to the extent that the fire

services reflect the make-up of the community they serve.").

The Report recognized that, "although the overall membership of the fire service has become more diverse, there are still a number of fire departments in which diversity does not exist or where there are barriers that limit either the upward or lateral mobility of minorities and women, irrespective of merit." *Id.* Moreover, "[a] fire department that reflects and represents the diverse community it serves, reduces language barriers, increases trust, and provides for two-way learning to close knowledge gaps. Multicultural communities become powerful partners for prevention." www.fire2020.org/OurMission.html.

In *Grutter*, both Justices Thomas and Scalia recognized that national security could be a compelling state interest or "pressing public necessity." *Id.*, at 353 (Thomas, J., dissenting), citing Justice Scalia's concurring opinion in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 521 (1989) ("At least where state or local action is at issue, only a social emergency rising to the level of imminent danger to life and limb...can justify [racial discrimination]."). *Id.*

Surely there is no stronger "social emergency" or "pressing public necessity" than when medical, fire, or other emergencies in our communities arise, which in turn affects the nation at large. See http://www.usfa.dhs.gov/about/; http://www.fema.gov/hazard/dproc.shtm. Firefighting, prevention, and

emergency response are thus both microcosmic and macrocosmic issues.[2]

Moreover, several lower courts have found that "race-conscious" acts by public employers do not violate the Equal Protection Clause if narrowly tailored, including those in law enforcement and legal corrections settings in the interests of diversity, and especially, community.[3]

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[2] It is axiomatic that the nation's communities cannot be in a state of "readiness" as paramilitary organizations – diversity-wise -- at the drop of a hat. The need for readiness is a perpetual, 24/7 job. Fires, bombs, bio-hazards, natural catastrophes, and medical emergencies rarely knock politely on the door and announce their presence.

[3] The interest typically has been defined as "operational need," upholding conscious acts in favor of diversity even in the absence of past discrimination, and premised on the finding that "the composition and operation of the [] force should be in as complete harmony as possible with the community from which it springs." *United States v. City of Chicago*, 663 F.32d 1354, 11364 (7th Cir. 1981) (en banc). *See, also, Petit v. Chicago*, 352 F.3d 1111, 1115 (7th Cir. 2003); *Reynolds v. Chicago*, 296 F.3d 524, 530-31 (7th Cir. 2002); *McNamara v. Chicago*, 138 F.3d 1219, 1223-24 (7th Cir.), *cert. denied*, 525 U.S. 981 (1998); *Talbert v. City of Richmond*, 648 F.2d 925, 931-32 (4th Cir. 1981); *Stuart v. Roache*, 951 F.2d 446, 450-52 (1st Cir. 1991), *cert. denied* ,504 U.S. 913 (1998); *Wittner v, Peters*, 87 F.3d 916 (7th Cir. 1996) (corrections setting); *Minnick v. Cal. Dept. of Corrections.*, 159 Cal Rptr. 260 (1979); *see, also, Patrolman's Benevolent Ass'n v. City of New York*, 310 F.3d 43 (2d Cir. 2002) (recognizing need for diversity as operational need, but failing to find narrow tailoring); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 314 (1986) (Stevens, J., dissenting) (noting the importance of law-enforcement community trust and relations in some instances, justifying limited race-based actions or policies).

Diversity as a compelling interest in fire service is defined as more than mere "aesthetic" goals or having a "certain appearance" in the fire department for public approval. Rather, it is a necessary component of the very fabric of our homeland safety and cohesion in the ranks of the paramilitary organizations of fire departments. Just as long ago recognized by the military (through hard, nearly riotous times), so it must be recognized here, as well: that diversity is a compelling state interest in any paramilitary system of a similar nature and structure assigned to the public duty of protecting the nation's people. See, e.g., Remarks of Admiral Thad Allen, Commandant, U.S. Coast Guard, *Diversity and Readiness*, Leadership J., July 25, 2008:

> Diversity is a concept that extends far beyond the traditional legal notions of equal opportunity and civil rights. Diversity is really the broad representation of culture, religion, values, ethnicity, gender, education, life experience, professional qualification, and the other many things that make us unique as individuals. As I noted in my remarks at NNOA[,] inclusion of diverse individuals and viewpoints produces better decisions and action in organizations. I really see diversity as a readiness issue that all of our senior leaders and unit commanding officers must consider as one of the keys to effective mission execution.

http://www.dhs.gov/journal/leadership/2008/07/diversity-and-readiness.html; *see, also,* General Colin Powell, Speech to Bowie State University, Maryland (May 25, 1996), defending affirmative action as a

necessary way to reach a "color-blind" society and acknowledging "it's not over yet").[4]

Recently, the International Association of Fire Fighters (IAFF) commissioned a large study for cities across the nation to assess the importance of diversity in fire departments, and efforts to increase it through hiring. See *Achieving and Maintaining a Diverse Fire Service Workforce* (January 2006), *available at* https://www.iaff.org/hr/media/IAFF%20Diversity%20Report.pdf, finding that the "best practices" departments regularly took race into account in attempting to diversify their forces and meet the changing needs of a fire service in an ever-changing American landscape.

2. The Examinations at Issue Did Not Realistically Test for "Merit" in Fire Command Scenarios.

As the district court rightly noted, "performing well on an exam does not create an entitlement to promotion....Second, a presumptively flawed test result may not be a proper measure for determining whether anyone should be promoted." *Ricci v. DeStefano,* 554 F.Supp.2d 142, 161-62 (D. Conn. 2006).

"Merit" in firefighting is, at best, an amorphous concept. Indeed, in any profession, "[m]erit must be merit in reference to something, for some purpose, based on some set of judgments and justifications.... When merit is defined as excellence in test-taking,

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[4] http://query.nytimes.com/gst/fullpage.html?res=990DE7DC1639F93BA35755C0A960958260&partner=rssnyt&emc=rss.

however, the selection process is not as color-blind as it claims to be." Michael K. Brown, et al., *Whitewashing Race* (Univ. Cal. Press 2d ed. 2003) at 191 (noting faulty use of LSAT tests for admission).

Amici assert that, in firefighting, particularly in the upper ranks, "merit" is more a reflection of character, integrity, and command constructs that do not lend themselves well to written "job knowledge" tests preferred by Petitioners and many persons who sue cities for reverse discrimination. It is widely known that blacks and Hispanics in any high-stakes testing, such as firefighter promotional exams, typically score lower than particularly on traditional cognitive exams. However, it also is known that such exams, which typically test so-called "job knowledge," are not particularly highly correlated with on-the-job-success, and indeed tend to result in a phenomenon referred to as "selection system bias." *Whitewashing, supra,* at 63, citing N. Schmidt, et al., *Adverse Impact and Predictive Efficiency of Various Predictor Combinations*, 82 J. of Applied Psychol. (1997), at 719-730; *The Black-White Test Score Gap* (Christopher Jencks and Meredith Phillips, eds., The Brookings Inst. Press 1998), at 57-58.

Indeed, abundant research shows that job knowledge is only a small part of the job performance domain, and clearly not the most important factor influencing job performance ratings. *See, also,* Borman, W. C., White, L. A., Pulakos, E. D., & Oppler, S. H., *Models of supervisory job performance ratings*, 76 J. of Applied Psychol. 863-872 (1991); Sternberg, R. J., *Managerial intelligence: Why IQ isn't enough*, 23 J. of Mgmt. 475-493 (1997); Smith, M., *Why executives fail*, 10 Personnel Psychol 7-21 (1994).

Further, research has shown that other types of testing measures have smaller black-white group differences, such as assessment centers and work samples. See, Dean, M.A., Roth, P.L., & Bobko, P. *Ethnic and gender subgroup differences in assessment center ratings: A meta-analysis*, 88 J. of Applied Psychol. 683-691 (2008); *Work sample tests in personnel selection: A meta-analysis of Black-White differences in overall and exercise scores*, 61 Personnel Psychol. 637-662 (2008).

It is assumed that candidates for promotion in the fire service already meet the basic knowledge requirements, including years in rank and satisfactory performance on the job. When hired, they enter a training academy that teaches them the basics; the rest is learned on the line. At the promotional level, "job knowledge" is presumed; in learning to deal with national emergencies, training is used. The mere fact that "multiple guess" is a cheap method of testing for cities is irrelevant. Many newer and more sophisticated testing methods, such as assessment centers and other measures and criteria for promotion are just as valid and cost-efficient. New Haven is free by civil service rule to use them. See Joint Appendix, A332 New Haven, Conn., Civ. Service Comm'n Rules, Rule III, Section 4 (allowing much leeway in choice of test types).

As noted in the district court's opinion, Petitioners' primary explanation for the adverse impact on black promotional candidates is that "the higher-scoring firefighters simply studied harder." *Ricci,* 554 F.Supp.2d at 150-151. However, the differences in scores are not due to intelligence or study habits, but largely to the implicit problems that arise in high-

stakes testing and candidates' own innate awareness of the stereotypes at play.[5]

> As noted by Richard S. Barrett, an industrial-organizational psychologist,
>
> Knowing what to do and being able to do it are two different things.... Stressful jobs, like those of police officers and firefighters, are especially prone to this problem.
> ***
> Generally, important information and the situation to which it is applied are too complex for a multiple-choice format. The result is a test that relies heavily on trivia ....Much of the limitations of multiple-choice tests can be summed up by the term *surface processing*. They are characterized by superficial information that is discrete and trivial. They do not reward – in fact, they punish – the applicant who carefully considers problems before acting.

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[5] Recent research in Implicit Associational Testing (IAT), which uses novel methods to ferret out hidden biases and stereotypes not present in self-report studies, has revealed that, under given conditions, blacks, women and even white males suffer from "stereotype threat," where test results can be manipulated by merely showing "success rates" of other groups compared to the race or sex of those taking the tests. Control groups without the stimulation scored as well as whites. Indeed white males shown articles on "superiority" of Asians in math tests scored lower than Asians as a result. There also is a phenomenon called "stereotype boost," in which persons primed or expecting to do better than on high-stakes testing, actually do, regardless of actual ability of the two groups. See Kang, Jerry, and Banaji, Mahzarin R., *Symposium on Behavioral Realism*, 94 Cal. L. Rev. 1063, 1087-88).

Barrett, Richard S., *Challenging the Myths of Fair Employment Practices,* (1998), at 46.[6]

See, also, Boston Chapter NAACP v. Beecher, 504 F.2d 1017, 1023 (1st Cir. 1974):

> There is a difference between memorizing (or absorbing through past experience) the firefighter terminology and being a good firefighter. If the Boston Red Sox recruited players on the basis of their knowledge of baseball history and vocabulary, the team might acquire authorities....who could not bat, pitch, or catch.

Petitioners' claim in this case that blacks just didn't study as hard is a bell continuously rung in a majority of recent "reverse" discrimination cases. Such thinking – and, often, promotions as a result of poorly constructed exams – merely serves to buttress many white firefighters' false sense of superiority, reinforcing classic examples of debasing stereotypes that African-Americans are just "dumb" and/or "lazy." Not only is this irrational, it is demeaning to all firefighters and the diverse communities they serve. And it is entirely unsupported.[7]

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[6] Dr. Barrett testified in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975) and *Washington v. Davis,* 426 U.S. 229 (1976). He also was instrumental in helping to draft the current version of the *E.E.O.C. Guidelines.*

[7] Indeed, for all Petitioners' complaints about how much time they spent studying for the exams, "[t]he time spent on learning to take tests is of no benefit to the employer." *Challenging, supra,* at 44.

The problem of continuing reliance on exams with proven adverse impact on minorities was well-put by Justice Thomas, joined by Justice Scalia, in *Grutter*:

> Similarly no modern law school can claim ignorance of the poor performance of blacks, relatively speaking, on the Law School Admissions Test (LSAT). Nevertheless, law schools continue to use the test and then attempt to "correct" for black underperformance by using racial discrimination in admissions..... The Law School's continued adherence to measures it knows produce racially skewed results is not entitled to deference by this Court....An infinite variety of admissions methods are available to the Law School.

Id., 539 U.S. at 370 (Thomas, J., concurring and dissenting in part, joined by Scalia J. (Parts I-IV)).

Long ago Albert Einstein observed that the definition of "insanity" is doing the same thing over and over again and expecting different results. Here, New Haven took the measure of not certifying the exams or promoting anyone, so it could explore more accurate, valid, and less discriminatory alternatives, as discussed at the certification hearings held by the city. The hearings showed both the existence of such measures, and also the history of New Haven promotional exams in the past that had adverse impacts on blacks, particularly the tests at issue.

Rather, what matters is not skill at test-taking but proper tests with lesser adverse impact that are a better predictor of first-responder command capabilities.

Moreover, as the district court rightly pointed out, no candidate taking either exam had or has a vested right in promotion. *Ricci*, 554 F.Supp.2d at 160.

3. The Impediment of "Tradition" in the Fire Service

It is well-documented that the fire service in America is characterized by its legacies. *See, e.g.*, http://fire2020.org/Newsletter/Diversity908.pdf. According to Stephanie Schorow, author of *Boston on Fire: A History of Fires and Firefighting in Boston* (Commonwealth Eds. 2003), firefighting is a longstanding tradition of legacy. "Many firefighters, their grandfathers, their fathers were firefighters, they want their sons to be firefighters." See Deirdre Fulton, *Backsliding: Firefighters just aren't there yet*, Boston Phoenix, March 21-25, 2005, *available at* http://www.bostonphoenix.com/boston/news_features/this_just_in/documents/04559106.asp.

In any career fire department, it is commonplace to see the same surnames on seniority rosters spanning decades. In essence, the fire service, like many other professions, can often exemplify "opportunity hoarding by one group to the detriment of another." See *Whitewashing Race, supra,* at 191. Indeed, "opportunity hoarding" can be widely seen in the numerous reverse discrimination suits against fire departments by individuals, such as Petitioners, seeking to restore the former status quo, and falling victim to believing that every act that increases diversity on a firefighting force necessarily is intentionally "racist" against whites.

In *Hayden v. County of Nassau*, 180 F.3d 42 (2d Cir. 1999), for example, several white police applicants unsuccessfully sued the county under the Equal Protection Clause when the county altered its testing from multiple guess to equally valid entrance exams that had a lesser adverse impact on blacks. The plaintiffs, like Petitioners, preferred the traditional tests and accused the county of race discrimination merely because it sought to increase its department's diversity.

The trend is a type of reverse "political correctness" where the goal is to ensure that a city fire or police department has no deference at all. Yet, such would be the bane of the civil service system, which has been called "the one great political invention of nineteenth century democracy" and is in place to ensure that communities are properly protected by public entities that serve them. See *United Pub. Workers v. Mitchell*, 330 U.S. 75, 121 (1947) (Black, J., dissenting). Any smoothly functioning civil service system requires a limited but reasonable amount of deference, such as allowing implementation of diversity-based initiatives in first-response safety forces. Certainly, it allows such systems to refuse to certify tests that have an adverse or discriminatory impact, rather than promoting from them.

As shown *infra*, however, the most pernicious aspect of entrenched traditions is that black firefighters hired under consent decrees are now coming of age for retirement. Their numbers are not being replenished but are decreasing. Even in cities increasing diversity hiring, it is still a matter of years until such new hires are even eligible for promotion to higher rank. The result is that, as domestic

emergencies increase and as America's communities become more diverse, fire departments are becoming increasingly less diverse at the higher levels of command, where the need is greatest.

4. A Future Jeopardized: Impending Black Retirements and Diminishment of Black Diversity in Fire Service and First Response.

The American fire service did not truly start being integrated until courts stepped in, and numerous consent decrees across the country ordered racial hiring as a remedy for clear and ongoing discrimination and segregation in the 1970s and 1980s. To the "legacies," this was bad enough, but after a few years in rank, such newly hired blacks would be eligible for promotion, meaning they could occupy positions of command. Various methods to avoid or dilute minority upward mobility were employed, often at the behest, or with the assistance, of powerful, white-controlled public fire unions. (Indeed, it is undisputed that the New Haven firefighters union, Local 825, filed a companion suit to this one on behalf of its white members; the suit was dismissed by the district court, which found lack of standing and serious potential conflicts of interest. See *New Haven Firefighters Local 825 v. City of New Haven*, No. 3: 04-cv-1169 (D. Conn. Dec. 22, 2005) (Doc. 70).

It is not just in testing that the entrenched class protects its own sense of entitlement. Nearly all black first responders, particularly the few ones achieving rank, can share stories of debilitating treatment throughout their years of service based on race – some seemingly neutral on their face but *not* neutral and done with purpose to discriminate – created to keep

blacks and other minorities "locked in" to lower ranks, if they manage to get hired at all.[8]

Due, in part, to lack of numbers, it is pervasive throughout blacks' experience in the nation's fire service that they are perceived by many whites unqualified or lesser qualified. Yet, there is virtually no factual support for this notion. Petitioners cite no studies indicating that black officers are less capable than their white counterparts.[9]

Indeed, nearly all professional fire departments, including New Haven, utilize what is known as "Acting Time," in which lower raking officers are assigned in higher-ranking positions and perform in such positions (at the higher rate of pay) without undergoing "merit" testing. Skilled and experienced black officers who have successfully acted in higher ranks often prove their merit through actual performance. Yet, as younger, less experienced white firefighters rise up

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[8] This "locked-in" syndrome is well-recorded in other employment arenas, but is particularly visible in fire service. For example, in Cleveland, union and some city officials dealt with a promotional consent decree from the 1980s by assuring that virtually all blacks achieving promotion under the decree were assigned to a single battalion (Bat. 5); there are 6 battalions total. Bat. 5 was dubbed "Monkey Island" by many of the whites because virtually all of the officers and the overwhelming majority of black firefighters were and remained assigned there. This was not 1962 or 1982, but 2004. See *Jordan v. City of Cleveland*, 464 F.3d 584, 589 (6th Cir. 2006).

[9] To the contrary, since the period of fire integration during the period of the 1970s and 1980s, when black firefighters were hired under consent decrees, fire deaths actually dropped. See *America Burning Revisited, 1987, supra*.

through the system, older and more experienced black first responders are taking orders (and sometimes giving advice) in a career in which they cannot seem to move ahead.

With the expiration of many fire department consent decrees in the late 1980s and 1990s, minority hiring dropped off sharply. Indeed, the number of black firefighters compared to whites in the U.S. fire service is diminishing at an alarming rate. So are the numbers of black ranking officers in fire service.

For example, in 1995, black representation in professional fire service was at its peak, at approximately 15.3%. See NFPA, *The U.S. Fire Service*, "The U.S. fire service (2007)," *available at* http://www.nfpa.org (select "Research," select "Fire statistics" under "Research," select "The U.S. fire service").

In 2008, only 8.2% were black, and of first-line supervisors, only 5.8% were black. See U.S DOL, Bureau of Labor Statistics, Labor Force Statistics from the Current Pop. Survey, Table 11 (2008), http://www.bls.gov/cps/tables.htm# charemp.[10]

While, to date, there is no comprehensive source of city fire department demographics, the numbers from

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[10] On a departmental level, 13% of all fire departments (estimated 30,185 total number of departments) are career or mostly career and protect 62% of the U.S. population; 74% of the career firefighters are in communities that protect 25,000 or more. See http://www.nfpa.org. In 2008, there were 320,000 career firefighters and fire inspectors in 2008 and 54,000 first-line supervisors in firefighting and prevention. http://www.bls.gov.

select large cities around the nation are telling. For example, as of 2004 in Cleveland, OH, which has a 51% black population, less than 22% of its firefighting force was black. That disparity was reflected to an even greater degree among the fire division's officers: only 25 black lieutenants out of 178; two black captains out of 62; three black battalion chiefs out of 29; and two black assistant chiefs out of seven (at least one of them had been promoted only after filing a discrimination suit). See *Jordan,* 464 F.3d at 589.

In Boston, MA, as of March 2, 2005, 33% of the 1450 uniformed firefighters in the department were minorities; of those, 384 were black, 105 were Hispanic, 16 were women, and only one was Asian. The leadership positions were dominated by white men, who comprised 185 of 217 lieutenants, 75 of 79 captains, and 56 of 60 district chiefs. See Deirdre Fulton, *Backsliding: Firefighters just aren't there yet*, Boston Phoenix, March 21-25, 2005, *available at* http://www.bostonphoenix.com/boston/news_features/this_just_in/documents/04559106.asp.

In Austin, TX, as of January 2009, uniformed firefighters and specialists in the department comprised a total complement of 1,013. Of 531 members at the firefighter rank, only 7.2% (38) are black. There are only 5 black lieutenants out of 178, one black captain out of 68, no black battalion or division chiefs, and only one black assistant chief. See Michael King, *Disagreeing to Agree: With contract negotiations suspended, Austin firefighters look inward for a change*, Austin Chron., Jan. 16, 2009, *available at* http://www.austinchronicle.com/gyrobase/Issue/story?oid=oid:726663.

In New Haven, as of 2007, while there are 99 blacks out of 359 uniformed personnel and a total of 82 officers, only 13 are officers are black. Source: New Haven 2007 EEO-4 Report.

Moreover, a disproportionate number of African-Americans in the fire service today were hired in the 70s and 80s under consent decrees or as a result of litigation. Most in this block of first responders are eligible for retirements (if not already retired) and will be retiring within the next five years. For example, in Cincinnati, OH, 94 of the 251 African-American firefighters on the job (out of 851 total) were hired prior to 1989. Out of a total of 46 black officers, 28 are slated to retire within the next few years.

Consequently, the use of inherently discriminatory and ineffective testing methods, such as those preferred by the Petitioners and their *amici*, will necessarily result in staffing and promotion of predominantly white personnel. The effect of this is self-evident: as American communities rapidly become more diverse, the fire service will be heading in the distinctly opposite direction, impeding its effectiveness and ability to fulfill its vital role in the nation's security.

USFA's James Witt recommends, "There should be recognition and respect for leaders and departments that put an end to those traditions that limit evolution toward a diverse fire and emergency services organization." *America Burning Recommissioned, supra,* at 30.

NEW HAVEN'S RESPONSE TO THE EXAMS' ADVERSE IMPACT WAS NARROWLY TAILORED

1. There Was No Racial Classification or Discriminatory Intent in New Haven's Decision Not to Certify the Examinations.

As stated in their Statement of Interest, *amici* do not think this case is one that used illegal race-based decisions in refusing to certify the exams. Thus, strict scrutiny is not warranted, as no proof of intent was shown, no individuals were singled out for preference or harm, nor was any racial classification system employed. In *amici*'s view, New Haven's actions were entirely proper and constitutional under the circumstances.

However, in the event this Court finds that strict scrutiny is warranted, *amici* already have shown a compelling state interest in the need for a diverse, cohesive fire-fighting force in a constant state of readiness for local and national disasters. Moreover, New Haven's response was sufficiently narrowly tailored to pass constitutional muster. Indeed, it is Petitioners who are seeking unfair classifications based on their "whiteness" and on allegedly deserved promotions that they never even prayed for in their complaint.

Members of this Court have held that, "without proof of discriminatory intent, a generally applicable law with disparate impact is not unconstitutional.... The Fourteenth Amendment does not regard neutral laws as invidious ones, *even if their burdens purportedly fall disproportionately on a protected*

class." Crawford v. Marion County Election Bd., 128 S.Ct. 1610, 1626 (2008) (Scalia, J., concurring opinion, joined by Thomas, J., and Alito, J., citing *Washington*, 426 U.S. at 248 (1976)) (emphasis added).

Here, Petitioners simply appear to be accusing New Haven of affirmative *inaction*. There is no evidence of any racial classifications of persons in the New Haven fire department that were favored or disfavored. Upon consideration of the examinations and their facial adverse impact on minorities, and the testimony at the public hearings, the civil service commission was obligated to decline to certify the exams. This is perfectly legal, as the district court found. *See, e.g., Village of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252 (1977) (black petitioners failed to prove that respondent was motivated by discriminatory purpose).

Hence, any burdens caused by New Haven's failure to certify the examinations, that fall on high-scoring examinees, are minimal at best – particularly in light of the questionable validity of the examinations themselves.

2. Narrow-tailoring Applies in this Circumstance.

a. Law-abiding cities cannot be forced into a Catch-22 between constitutional duties.

The venerable Judge Learned Hand once stated, "There is no surer way to misread any document than to read it literally[.]" *Guiseppi v. Walling*, 144 F.2d 608, 623-624 (2d Cir. 1944), concurring opinion. The over- or misinterpretation of the Equal Protection

Clause leads to paralysis of city administrations' attempts to diversify, as evidenced by the increasing number of reverse discrimination claims in by white first responders. It also has led to a decrease in actual diversity in fire service at the hands of many courts.

Yet, the Fourteenth Amendment and Equal Protection Clause, as well as Title VII, seek equal opportunity for all in public employment. However, for the *maintenance* of equality, it must first be realistically achieved.

Even today, this Court has recognized the "unhappy persistence of race discrimination" in this country, in *Adarand,* 515 U.S. at 237; *see, also, Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1,* 127 S.Ct. 2738, 2791 (2007), Kennedy, J., concurring:

> [O]ur tradition is to go beyond present achievements, however significant, and to recognize and confront the flaws and injustices that remain. This is especially true when we seek assurance that opportunity is not denied on account of race. The enduring hope is that race should not matter; the reality is that too often it does. *** This is by way of preface to my respectful submission that parts of the opinion...imply an all-too-unyielding insistence that race cannot be a factor in instances when, in my view, it may be taken into account.

Unless interpreted properly, the Equal Protection Clause will put cities that attempt to follow the law in untenable positions. Cities are bound by numerous duties with respect to fire service. They have a compelling state interest in homeland security, which

includes diversity in rank, and ensuring new hires for unity and cohesiveness. Cities and fire administration, first and foremost, have the duty to use alternative measures in face of compelling interest. Moreover, such measures exist currently.

In this case, as revealed by the underlying record, New Haven exercised its lawful discretion to explore and use those alternative measures; indeed, not certifying the tests themselves was a form of a very limited alternative measure to reach the ultimate goal of employing a more accurate, less-discriminatory promotional process. Under Petitioners' logic, potentially *any* move a city makes to diminish adverse impact will take "race" into account in some fashion. Does this necessarily mean that it will run afoul of the Fourteenth Amendment? It cannot possibly mean so, without truly being "fatal in fact."

This clearly is not – and never was – the intent of the Equal Protection clause. See *Washington v. Davis*, 426 U.S. at 239 (requiring proof of intent); *Crawford*, 128 S.Ct. at 1626, concurrence of Justices Scalia, Thomas and Alito (neutral laws [or acts] are not invidious, even if some burden falls disproportionately on a protected class).

b. Neither recruiting nor "tutoring programs" for blacks is a reasonable or viable alternative measure.

Petitioners ironically claim there was no showing of "alternative measures" in this case, despite the fact that four days of hearings focused largely on testimony by experts discussing recent alternative measures available, as shown *supra*. Rather, Petitioners state

that the city could employ "tutor groups" for blacks, or make additional study materials available for incumbent black firefighters (many of whom have advanced degrees). However, such procedures are not equally valid alternatives to tests that consistently have an adverse impact on blacks and other minorities.

Nor are these procedures viable alternative measures for promotional candidates. Indeed, such relief would only reinforce the false stereotype put forth by Petitioners that blacks "just don't study" as hard as whites, or are otherwise intellectually lacking. They might also spawn more "politically correct" reverse-discrimination lawsuits by whites who don't have the same "tutor advantages." Most important, it would not solve the underlying problem: that written, job knowledge tests are inwardly flawed for this type of job and cannot adequately measure the intricacies of fire command. What is needed are alternative *measures* for promotion, not artificial pacifiers, such as "tutoring" that only reinforce the stereotypes held by an existing incumbent class

Likewise, future hiring recruitment strategies cannot solve the problem faced by New Haven and other cities in promotion. While recruiting efforts should be lauded and practiced by cities nationwide, they cannot address the disturbing lack of ranking officers in today's fire service. They can only assist in a distant future – and then, only if the avenues to promotion are not blocked, as they have been in the past and reflected in the present.

In sum, under the circumstances, the most narrowly tailored course of action in this situation is

not certifying examinations that show unjustified adverse impact of discrimination. Again, it is one-time, involves no racial classifications or preferences in promotion, and is necessary and justified in light of the compelling state interest of having a diverse local (and thus, national) fire service. The Equal Protection Clause is not sullied in this situation. New Haven's acts were narrowly tailored and appropriately limited under the circumstances.

CONCLUSION

Based on the foregoing reasons, *amici* most respectfully move this Court to affirm the judgments of the district court and the Second Circuit Court of Appeals.

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March 25, 2009

Nos. 07-1428 and 08-328

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v.

JOHN DESTEFANO, ET AL., RESPONDENTS

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JOHN DESTEFANO, ET AL., RESPONDENTS

On Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

BRIEF OF THE INTERNATIONAL ASSOCIATION OF HISPANIC FIREFIGHTERS AND BRIDGEPORT HISPANIC FIREFIGHTERS ASSOCIATION AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE

The *amici curiae* are the International Association of Hispanic Firefighters (IAHF) and the Bridgeport Hispanic Firefighters Association (BHFA).[1] IAHF is a not for profit organization created to support Latino firefighters in the United States and the Latino family of nations, and to enhance service of and risk reduction in the Latino community. BHFA is also a not for profit organization created to provide networking and training opportunities for Latino firefighters in Bridgeport, Connecticut.

This case will affect the hiring and promotional practices of public safety offices in Connecticut and throughout the country, and through those practices the measures that local governments may use to guard against discrimination in employment and to promote diversity and services to traditionally underserved populations, including Latinos. As a result, the *amici* have a direct interest in this case.

SUMMARY OF ARGUMENT

This Court should affirm the Second Circuit's judgment that a decision to avoid potential discrimination is not itself discrimination. To reverse will exacerbate racial tensions in public safety departments in Connecticut and in other workplaces

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[1]The parties have consented in writing to the filing of this brief. No counsel for a party authored this brief in whole or in part and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

throughout the country by giving credence to the notion that racial justice is a zero-sum game with every win for a person of color representing a loss for a white person, or vice versa.

Additionally, the key issue in a disparate treatment case is what motivated the employer to act. Motivation is a question of fact. In this case, there was compelling, unrefuted evidence to suggest that the defendants were motivated by a desire to comply with Title VII and avoid using discriminatory promotion criteria. Petitioners had the opportunity to show that these reasons were a pretext for discrimination, but they failed to create a genuine issue of material fact warranting denial of summary judgment because they did not provide any evidence from which a reasonable jury could conclude that the defendants are not being truthful about their motivation.

ARGUMENT

I. Reversing the Second Circuit's Judgment that a Decision to Avoid Potential Discrimination Is Not itself Discrimination Will Exacerbate Racial Tensions in Public Safety Departments in Connecticut and in other Workplaces throughout the Country

This case has been framed in the media as if race in the workplace represents a zero-sum game, as if every promotion given to a person of color is an injury to a white person. This framing presumes uncritically a number of things: that white people are somehow naturally entitled to promotions, that people of color are not, and in this particular case, that

performance on standardized tests alone is an appropriate measure of merit. These uncritical presumptions and this sort of racial politics are wholly counterproductive to eliminating discrimination in this country.

The goal of Title VII is to eradicate discrimination, to change the social norms so that people no longer engage in acts that discriminate on the basis of race, in other words, to avoid the harm of discrimination. *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975). As a part of that effort, this Court has recognized that employers must be given incentives to voluntarily comply with the statute. *See, e.g. Faragher v. City of Boca Raton*, 524 U.S. 775, 806-07 (1998). To say that an action taken to avoid discriminating is itself discrimination would make this impossible.

The City of New Haven was faced with evidence that its promotional tests had a serious adverse impact on Latinos, as well as African Americans. For the lieutenant's exam, the pass rate for Whites was 58.14%, but for African Americans, it was 31.58%, and for Latinos, it was a mere 20%. Pet. App. 426a, 429a-432a, 437a. The pass rate for Latinos fails the Equal Employment Opportunity Commission's four-fifths rule by a wide margin, supporting an inference that the test created a serious disparate impact on Latinos, in particular. The pass rates for the captains exam were similar. On the captain's exam, Whites passed at a rate of 64%, while African Americans and Latinos each passed at a rate of 37.5%, again, failing the four-fifths rule by a wide margin. *Id.* at 427a, 433a-436a, 438a.

It was not only the pass rate that suggested an

adverse impact. The relative ranks of Latinos who passed the exams were low. The highest scoring Latino was ranked 27th on the lieutenant's exam, which ensured that no Latino scored well enough to be able to be promoted under the city's rules. *Id.* at 437a. And only two Latinos scored well enough on the captain's exam to be considered for promotion, one of whom is one of the plaintiffs. *Id.* at 438a. Furthermore, over the one to two year life of the lists, only one more Latino candidate could ever have been promoted, not the four more one might expect if the tests were fair

Faced with this evidence, the defendants were understandably concerned that the promotions process might create an unlawful disparate impact, that the process was an obstacle to equality of opportunity in the fire department. The defendants' decision to scrutinize the process and explore whether there might be less discriminatory alternatives should be encouraged rather than discouraged.

Such scrutiny and exploration was necessary in the city of Bridgeport, which has also had to overcome a significant history of race discrimination. *See, e.g., Ass'n Against Discrimination in Employment, Inc. v. Bridgeport*, 647 F.2d 256 (2d Cir. 1981); *Ass'n Against Discrimination in Employment, Inc. v. Bridgeport*, 594 F.2d 306 (2d Cir. 1979); *Ass'n Against Discrimination in Employment, Inc. v. Bridgeport*, 479 F. Supp. 101 (D. Conn. 1979). Its solution has been to change the relevant weights of promotional exam: the oral examination constitutes 65% of the score, and the written examination 30%. Pet. App. at 485a-486a. The city of Bridgeport was also sued recently for discrimination against white firefighters for the relative weights given the written and oral

examination pieces of a promotional examination; that suit proved unsuccessful. See *Bolton v. Bridgeport*, 467 F. Supp. 2d 245 (D. Conn. 2006). The kind of experimenting with assessment methods to find a valid measure of fitness for promotion while minimizing the racial impact of the process, like that done by the city of Bridgeport, should be encouraged.

We have come a long way in the more than forty years since Title VII was enacted. Race is becoming less salient with every new generation of workers. A decision by this Court equating Title VII compliance efforts with discrimination will inevitably reverse that trend. And if that trend is reversed, not only do we freeze our progress toward racial justice where we are, or perhaps move backwards, but we also make race something always to be contested.

Suggesting that white people are injured when an employer decides not to act out of concern that the action would discriminate reinforces the notion that white people have some sort of greater entitlement to jobs or promotions than do people of color. *Cf. Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). It creates an incentive for white people to resist employer compliance with Title VII, and it creates an incentive for white people to resist social advancement of people of color in other settings as well. Such an incentive would take racial politics back to the 1960s or before. *See Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, ___, 127 S. Ct. 2738, 2788-97 (2007) (Kennedy, J., concurring).

II. Petitioners Failed to Provide Sufficient Admissible Evidence from which a Reasonable Jury Could Conclude that the City's Reason for Discarding the Test Results Was a Pretext for Discrimination

Plaintiffs allege that the Defendants' actions which led the City of New Haven's Civil Service Board (CSB) to not certify the results of the promotional exams for lieutenant and captain constituted disparate treatment on the basis of race in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Both Title VII and the Equal Protection Clause prohibit a government employer from taking an adverse action against employees or applicants because of race.

At the summary judgment stage in employment discrimination cases, the test used to determine whether enough facts exist to warrant going to trial is that developed by this Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and refined in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), and *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000). In a failure-to-promote case, the plaintiffs must provide enough evidence to prove a prima facie case of discrimination: first that the plaintiffs are members of a class protected by Title VII or the Equal Protection Clause; that they applied and were qualified for promotion; that they suffered an adverse action, such as that they were denied promotion; and that there is

something to link that denial with their protected class. *McDonnell Douglas Corp.*, 411 U.S. at 802-03.

Once the plaintiff has proven a prima facie case of discrimination, the defendant has the burden to produce evidence that it was motivated by a non-discriminatory reason. *Id.* at 802-03. If the defendant meets that burden, the plaintiff may still prevail by providing evidence from which a reasonable jury could conclude that the employer's stated reason is a pretext for discrimination. *Id.* at 803-04. The plaintiff may do that by providing evidence that casts the employer's articulated reason into doubt or by providing stronger evidence than that required for the prima facie case to link the decision with the plaintiffs' class. *Reeves*, 530 U.S. at 143. The key is that there must be enough evidence to allow a reasonable jury to disbelieve the employer's asserted reason. *Id.* at 147-48.

The employer's reason and pretext are viewed as subjective matters. The question is not whether the employer's reason is correct as an absolute matter, but whether the employer honestly believed in the truth of the reason. *See* Barbara Lindemann & Paul Grossman, Employment Discrimination Law 86-87 (4th ed. 2007) (collecting cases). In this case, there is simply no evidence to cast the honesty of the defendants' beliefs into doubt.

In the instant case, the district court and court of appeals assumed that the plaintiffs had satisfied their burden to provide evidence of a prima facie case. The defendants' proffered reason for their actions which culminated in not certifying the results is that they were concerned that the test might discriminate under the disparate impact provisions of Title VII. If this assertion is true in the sense that they really

honestly believed that the test discriminated, this would be a nondiscriminatory reason for all of the reasons that the defendants and several *amici* have suggested.

And as the Government points out in its brief, the only question that would remain is whether this reason was the defendants' real reason or instead was actually a pretext for discrimination. In other words, did the defendants honestly believe that the test might discriminate and did they want to avoid that result, or instead did the defendants desire to deny promotions to the plaintiffs *because* they were white? Did the defendants use race or a race linked criterion as a proxy for fitness for promotion? That is a factual question. And in this case, there was unrefuted evidence to suggest that the plaintiffs were motivated by a desire to comply with Title VII and avoid using discriminatory promotion criteria. Plaintiffs had the opportunity to show that these reasons were a pretext for discrimination, but they failed to provide evidence from which a reasonable jury could conclude that the defendants are not being truthful about their motivations.

The evidence in the record details how counsel for the city, defendant Ude, first raised the issue of potential discrimination to the CSB. Pet. App. 439a-444a. The opinion letter he provided laid out the facts and the law on disparate impact, acknowledging that while the disparate pass rates and rankings showed an adverse impact, the city could rely on a professionally developed test that was job related and consistent with a business necessity and that anyone challenging the test would still have the burden to demonstrate that there were other valid means to assess qualification

for promotion that would have less of an impact. *Id.* at 440a-442a. While there is evidence that Ude and the other defendant members of the city administration believed that the test discriminated by creating a disparate impact, there is no evidence that they acted on any motivation other than that sincere belief nor that they lied to the CSB or withheld evidence about the impact of this test or alternative processes. *See id.* at 446a-459a, 466a-589a. Defendant Ude repeatedly told the members of the CSB that they had a choice and could decide to certify the test, and other people, including CSB Chairperson Segaloff, argued in favor of certifying the results. *Id.* at 442a, 480a-484a, 574a-579a, 582a-584a, 586a-588a Plaintiffs provided no evidence at all that Ude or the other city administration defendants had any motivation other than concern about potentially discriminatory effects of the test or that they misled the defendant CSB members on either the law or the underlying facts.

The process by which the decision was made was also well documented. The CSB held open hearings, heard comments from the public, from the designer of the test, and from other people with knowledge of test design and differences in performance on standardized tests by race. *Id.* at 456a, 466a-589a. All of those who spoke confirmed that this exam had an adverse impact on candidates of color, the witnesses other than the test's designer stated that were other ways equally valid to assess fitness for promotion. Dr. Hornick, who runs a company that develops job tests testified that he had read the exam, although he hadn't studied the questions in depth, and he believed that there are other methods to assess qualifications, equally valid

but with less of an adverse impact on people of color. *Id.* at 546a-563a. Vincent Lewis, a career firefighter from Michigan, told the CSB that people of color often perform more poorly in the aggregate on standardized tests, that he couldn't say why that is, and that other fire departments have used a number of different remedies to neutralize that disparity. *Id.* at 563a-569a. Finally, Dr. Helms, a professor at Boston College who specializes in race and culture as those influence performance on tests and other assessment procedures stated that people of color tend to perform more poorly than white people on almost any kind of written test, and she explained some of the reasons that might be true. *Id.* at 570a-573a. She also said that new methods of assessment might need to be created and that if the reason for a disparate impact could be pinpointed, a test could be designed to neutralize that. *Id.* at 573a-574a.

There also was evidence in the record to demonstrate that the city of Bridgeport had encountered the same kinds of disparities in using a written test, had examined its process, and had found a valid alternative measure that did not have the same impact. Bridgeport had changed the weights given each part of the test as a result of its problems with racial disparity, so that the oral portion of the test was given 65% of the weight, and the written portion, only 30% of the weight. *Id.* at 485a. There was some evidence to suggest that the type of questioning that is done in the oral portion of the examination might better assess whether an applicant has the skills to perform well than would a written test. *Id.*

The evidence shows that members of the CSB deliberated, asked questions, and listened. *Id.* at 466a-

589a. And the two members who voted not to certify the results stated their opinions in the record. CSB member Mal Webber stated that he had planned to vote to certify,

> But I've heard enough testimony here to give me great doubts about the test itself and the testing – some of the procedures. And I believe we can do better . . . Therefore, I will vote No on this motion in order to move forward a deeper research and a complete study of how we're giving these exams because of the complete and rather horrifying disparate result of this particular examination.

Id. at 586a-587a. Similarly, CSB member Zelma Tirado sated "I also feel that the process was flawed, with the test as part of that process." *Id.* at 587a.

These statements of the two CSB members demonstrate that they were concerned that the test was flawed, that it created an unlawful disparate impact. Whether the test was flawed or whether a plaintiff would be able to successfully challenge the test under Title VII as an absolute matter is not the issue. What matters is whether they actually believed that the test was flawed or discriminated. There is simply no evidence to suggest that they did not believe what they said. And while the defendants did not hold a trial-type, fully exhaustive hearing on why the test had such disparate results, asking each person who took the test, for example, about their process in preparing and experience in taking the test, the failure to hold such an exhaustive hearing is simply not evidence that the defendants are being dishonest about their beliefs or were motivated by the race of the

plaintiffs.

Plaintiffs provided some evidence to try to meet their burden to demonstrate that the defendants' reasons were a pretext for discrimination, but none of that evidence cast the defendants' reasons into doubt or suggested that the defendants' real motivation was that the plaintiffs were white. Plaintiffs did not depose the defendants to assess the honesty of their assertion of their beliefs. Nor did plaintiffs provide any statements made by the defendants that were inconsistent with the asserted reason or any other evidence that weighs on the defendants' credibility. Plaintiffs instead focused on issues unrelated to the defendants' states of mind, like how the test was designed and how hard the plaintiffs worked. *Id.* at 147a-167a, 375a-425a. This evidence does not cast any doubt on the reasons proffered by the defendants and thus does not help the plaintiffs withstand a motion for summary judgment.

Taking the plaintiffs' evidence as true, as required on summary judgment, there is simply no evidence to suggest that the defendants have lied about their concern that the test might discriminate or might be flawed. Their blanket assertions of tainted process or improper influence simply are not evidence. The City's investigation was not so unreasonable to suggest that defendants did not actually believe that the test might be discriminatory. Rather, the CSB undertook a deliberate process, including multiple hearings where it heard from numerous witnesses, including some of the petitioners here and petitioners' counsel. Furthermore, there is simply no evidence to suggest that the defendants used race as a proxy for fitness to be promoted. Without that evidence, without

concrete examples to support their allegations of bias, summary judgment for plaintiffs was properly granted.

CONCLUSION

For the foregoing reasons, the judgment of the Second Circuit should be affirmed.

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March 25, 2009

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BRIEF OF INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, NATIONAL LEAGUE OF CITIES, NATIONAL ASSOCIATION OF COUNTIES, AND INTERNATIONAL PUBLIC MANAGEMENT ASSOCIATION FOR HUMAN RESOURCES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICI CURIAE*

Amici's members are intimately involved in government entities' hiring and promotion decisions and, therefore, have substantial experience with disputes such as the one presented in this case. *Amici* file this brief to inform the Court of the dramatic practical consequences of the legal standards proposed by petitioners.

The International Municipal Lawyers Association (IMLA), a nonprofit nonpartisan organization comprising over 2,500 local government entities, including cities and counties, and their subdivisions, develops and advances solutions to important legal issues faced by local governments. IMLA represents the interests of local governments through amicus filings in this Court, the federal courts of appeals, and state appellate courts.

The National League of Cities (NLC) is the oldest and largest organization representing municipal governments throughout the United States. Working in partnership with 49 state municipal leagues, NLC serves as a national advocate for the more than 19,000 cities, villages, and towns it represents.

The National Association of Counties (NACo) is the only national organization that represents county governments in the United States. NACo provides essential services to the nation's 3,068 counties through advocacy, education, and research.

The International Public Management Association for Human Resources is a professional association representing thousands of human resources professionals working for local, state, and federal governments. The Association provides information and

assistance to help these professionals increase their job performance and overall agency function.

As government employers, and the lawyers and human resources professionals who advise them with respect to challenges to employment-related decisions based on allegations of discrimination, *amici* have a strong interest in the recognition by this Court of a legal standard that will make it possible for local governments to resolve these disputes without in every case being required to expend scarce resources on expensive and time-consuming litigation.

SUMMARY OF ARGUMENT

Petitioners argue that a local government is obligated to utilize the results of an employment examination unless the examination violates Title VII or there is a "strong basis in evidence" of such a violation. The practical effect of that standard would be that—absent a judicial determination of the test's invalidity—a municipality will be compelled to utilize the results no matter how unjustifiable the questions contained in the test; no matter how disparate the burden on a particular racial, gender, or ethic group; and no matter how easily an alternative test with a significantly reduced disparate impact could be devised.

Because civil service laws require government entities to fill millions of jobs each year based on competitive examinations, petitioners' approach will mean exponentially more lawsuits, and therefore dramatically expanded costs at a time of shrinking tax revenues, as well as prolonged delays in filling positions that are often important to the effective provision of essential services. Petitioners' rule will also remove from elected officials and transfer to the

courts all responsibility for resolution of these sensitive disputes, notwithstanding their important implications for the communities that the elected officials represent.

Nothing in Title VII or the Equal Protection Clause requires that result. Strict scrutiny review does not apply to a reasonable decision by a government employer not to make hiring or promotion decisions on the basis of a competitive examination because of that examination's disparate impact on the basis of race, gender, or ethnicity—and instead to administer a new examination designed to ameliorate the disparate impact of the first test. And Title VII's disparate treatment principle cannot be interpreted to invalidate the very same statute's prohibition against employment practices that have a disparate impact.

Of course, if the proffered purpose is shown to be a pretext, and the employer actually was engaged in intentional racial discrimination—for example, to prevent the hiring of any employees of a particular race—then the employer will have violated Title VII and, if state action is involved, the Equal Protection Clause as well.

ARGUMENT

PETITIONERS' RIGID RULE WOULD IMPOSE HEAVY NEW BURDENS ON LOCAL GOVERNMENTS AND IS NOT JUSTIFIED BY TITLE VII OR THE EQUAL PROTECTION CLAUSE.

Municipalities hire and promote millions of workers each year subject to special constraints that private employers do not face. Municipalities are constrained by state and local civil service laws, which force many government employers to hire and

promote through competitive examinations. These examinations are designed to ensure merit-based hiring, but they often are claimed—sometimes justifiably—to violate the disparate impact component of municipal employers' obligation to engage in nondiscriminatory hiring and promotions under Title VII.

Petitioners argue that municipalities confronted with these disparate impact claims may not settle them—by invalidating the challenged examination and substituting a new test revised to eliminate or ameliorate the disparate impact—unless the challenged examination violates Title VII or there is "strong" evidence of a violation. The certain result of petitioners' rule will be the effective elimination of municipalities' ability to resolve expeditiously—and voluntarily—legitimate claims of impermissible disparate impact, whether discovered by the government entity itself or pointed out by potential Title VII plaintiffs, and dramatically increased litigation burdens for municipalities. Because a municipality would never be able to determine in advance how a particular examination would fare in a Title VII challenge, it would face the prospect of litigation challenging the examination if it did not settle and, if it chose instead to settle, litigation challenging that decision.

Nothing in Title VII or the Equal Protection Clause requires these draconian consequences. The Court's decisions make clear that—absent proof that the employer's stated goal of reducing a test's disparate impact is a pretext for refusing to hire individuals of a particular race, sex, or ethnicity—substituting one examination for another in an effort

to reduce the first examination's disparate impact violates neither Title VII nor the Constitution.

A. Millions Of Municipal Hiring And Promotion Decisions Each Year Turn On Merit-Based Criteria, Principally Competitive Examinations.

State and local governments are, together, the largest group of employers in the Nation, providing some 19.3 million of the country's 151.6 million jobs as of 2006—nearly 13% of the work force. Rose A. Woods & Eric B. Figueroa, Industry Output and Employment Projections to 2016, *Monthly Lab. Rev.* (Nov. 2007) at 53, 54. Local governments alone employ some 11 million full-time workers and an additional three million part-time workers. U.S. Census Bureau, 2007 Public Employment Data: Local Governments, http://ftp2.census.gov/govs/apes/07locus.txt (last visited Mar. 24, 2009).

According to the Bureau of Labor Statistics, there is considerable turnover each year. In 2008, local and state governments hired a total of 3.5 million workers. All but 700,000 were replacements for employees who had departed. At the end of 2008, these state and local governments were faced with over 300,000 job openings to fill.[1] On top of these hiring decisions, public employers make countless promotion decisions each year.

The vast majority of these millions of hiring and promotion decisions are subject to state or local civil

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[1] Bureau of Labor Statistics, Job Openings and Labor Turnover Survey, http://www.bls.gov/data/#employment (to retrieve data, select the "ones-screen data search" function within the Job Openings and Labor Turnover Survey Database).

service laws that require merit-based hiring and promotion.

Contemporary civil service employment systems are based on the late nineteenth- and early twentieth-century Progressive reforms designed to end corruption in government employment. New York and Massachusetts were the first to adopt such regimes. Osborne M. Reynolds, Jr., *Local Government Law* 303 (2d ed. 2001). By 1960, three-fourths of cities with populations over 10,000 had adopted a merit-based hiring and promotion system, including all cities with populations of at least a quarter million. Today, a majority of state and local government employees are covered by such provisions. *Ibid.*

These laws—which may be required by state constitution, state statute, or municipal ordinance—typically require the use of competitive examinations in hiring and promotion decisions. See, *e.g.*, Iowa Code Ann. § 400.1, 400.8-400.9 (West 1999 & Supp. 2008) (requiring competitive examinations for "cities having a population of eight thousand or over and having a paid fire department or a paid police department"); N.J. Const. Art. VII, § I ("Appointments and promotions in the civil service of the State, and of such political subdivisions as may be provided by law, shall be made according to merit and fitness to be ascertained * * * by examination, which * * * shall be competitive."); Ohio Const. Art. XV, § 10 ("Appointments and promotions in the civil service of the state, the several counties, and cities, shall be made according to merit and fitness, to be ascertained * * * by competitive examinations."); see also Conn. Gen. Stat. § 7-407 *et seq.* (2008) (prescribing method by

which municipalities may adopt merit hiring system).[2]

State civil service laws generally specify a similar basic structure for the examination process, though in some States, cities may adopt analogous provisions by local ordinance. The laws typically provide for a local civil service board or commission to oversee the process of formulating and administering the examinations. See, *e.g.*, Conn. Gen. Stat. § 7-410 (2008); N.Y. Civ. Serv. Law § 20 (McKinney 1999) ("Each municipal civil service commission shall prescribe, amend and enforce suitable rules for carrying into effect the provisions of this chapter.").

The rules and regulations are generally intended to provide "[f]or open, competitive examinations" and for "the filling of vacancies in offices and places of employment in accordance with the results of such examinations * * * ." Wis. Stat. Ann. § 63.25(1)(a) & (b) (West 1997 & Supp. 2008); see also Conn. Gen. Stat. § 7-409 (2008) ("The purpose of this part is to provide means for selecting and promoting each public official and employee upon the sole basis of his proven ability to perform the duties of his office or employment more efficiently than any other candidate therefor.").

The civil service board establishes basic eligibility requirements for examinations in various subject positions. These can include residency requirements or minimum levels of education. See, *e.g.*, Conn. Gen.

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[2] While merit systems are compulsory upon municipalities in many states, Connecticut makes adoption of such systems optional, prescribing a statutory form any such system must take. See Conn. Gen. Stat. § 7-407 (2008). New Haven has adopted a merit system. New Haven, Conn., Code Art. XXX (2008).

Stat. § 7-413 (2008) (permitting the commission to limit eligibility based upon "residence, age, health, habits and moral character").

The board also is responsible for preparing position-specific examinations to assess each candidate's qualifications for the relevant position, including job-based knowledge and skills. See, *e.g.*, Ohio Rev. Code Ann. § 124.23 (West 2007) ("Tests may be written, oral, physical, demonstration of skill, * * * [and] may include structured interviews, assessment centers, work simulations, examinations of knowledge, skills, and abilities, and any other acceptable testing method."); Wis. Stat. Ann. § 63.32 (West 2000). ("Such examinations * * * shall be job-related in compliance with appropriate validation standards and may include tests of physical qualifications, and, when appropriate, of manual skill."); Conn. Gen. Stat. § 7-413 (2008).

Aggrieved applicants typically may challenge the examinations before the commission certifies the results. These challenges may involve the test's substance, procedures, or outcomes. See, *e.g.*, W. Va. Code Ann. § 8-15-18a (LexisNexis 2007) ("If any applicant feels aggrieved by the answers and/or scores received on a promotional competitive examination, the commission shall * * * appoint a date, time and place for a public hearing. * * * After such review, the commission shall render a decision either in favor of the applicant, and therefore adjust the eligibility list * * * or the commission shall rule that the applicant's prior score should remain unchanged.").

The board does not appoint individuals to particular positions; rather, it certifies the examination results, creating a list of candidates eligible for promotion, rank-ordered by examination results. See,

e.g., Wis. Stat. Ann. § 63.37 (West 2000) ("[T]he board shall prepare and keep a register * * * of the persons whose general average standing upon examinations * * * is not less than the minimum fixed by the rules * * * and such persons shall take rank * * * in the order of their relative excellence as determined by examination * * * ."); Conn. Gen. Stat. § 7-414 (2008) (preparation of "eligible list"). This list is not used only for the positions open at the time the list is certified and then discarded. It may be used for hiring or promotion decisions for the particular position over a period of time. When vacancies arise, the commission sends a list of eligible candidates to the relevant appointing authority. See, *e.g.*, Conn. Gen. Stat. § 7-416 (2008) ("The appointing officer * * * shall notify the board of [any job openings], and the board shall certify to him the names * * * of a limited number of candidates * * * .").

The number of eligible candidates' names sent to the appointing authority is usually dictated by state or local law, often following the "Rule of Three," which requires the commission to forward the names of the three individuals highest on the eligibility list. See, *e.g.*, Mich. Comp. Laws Ann. § 38.413 (West 2005) ("Whenever a position * * * is to be filled * * * the commission shall certify the names * * * of the 3 candidates standing highest on the eligible list * * * ."); Conn. Gen. Stat. § 7-414 (2008) (requiring submission of "not more than three applicants having the highest rating").[3] The appointing authority must then hire or promote applicants from the names provided by the commission. See, *e.g.*, Ohio

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[3] New Haven followed a variant of that rule here. See Resp. Br. 4 & n.1.

Rev. Code Ann. § 124.27(B) (West 2007) ("Appointments to all positions * * * shall be made only from those persons whose names are certified to the appointing authority[.]").

If local governments violate civil service rules, whether in devising an examination, certifying the results, or otherwise, the relevant state and local statutes typically provide a judicial remedy. See, *e.g.* *Wood* v. *Irving*, 647 N.E.2d 1332 (N.Y. 1995) (hearing an appeal in Article 78 proceeding by police officer seeking appointment as detective); *Shirokey* v. *Marth*, 585 N.E.2d 407, 413 (Ohio 1992) (finding that the firefighter could have brought a declaratory judgment action to determine his rights to promotion under the City's civil service rules and Charter); *City of Round Rock* v. *Whiteaker*, 241 S.W.3d 609, 615 (Tex. Ct. App. 2007) (holding that plaintiff is not barred from filing a lawsuit to compel the City prospectively to comply with its civil service rule regarding promotion procedures); *Simonds* v. *City of Kennewick*, 706 P.2d 1080 (Wash. Ct. App. 1985) (hearing appeal on a lower court decision enjoining the Civil Service Board from giving effect to an employment exam that violated civil service laws); *Kelly* v. *City of New Haven*, 881 A.2d 978, 981 (Conn. 2005) (approving injunction of appointment methodology inconsistent with statutory "rule of three"); *Carney* v. *Civil Service Commission*, 30 P.3d 861 (Colo. App. 2001) (invalidating municipal police promotion examination as arbitrary and capricious); *Collado* v. *City of Albuquerque*, 45 P.3d 73 (N.M. Ct. App. 2002) (ordering retroactive promotion of applicant injured

by multiple irregularities in merit promotion process).[4]

Civil service laws may not be the sole constraint governing a municipality's hiring procedures. A number of States make hiring and/or promotion standards a subject of collective bargaining—and provide that the provisions in the collective bargaining agreement are binding on local governments. Tex. Loc. Gov't Code. Ann. § 174.006 (Vernon 2008) ("A state or local civil service provision prevails over a collective bargaining contract * * * unless the collective bargaining contract specifically provides otherwise."); Conn. Gen. Stat. § 7-474(g) (2008) (permitting collective bargaining with respect to "(1) The necessary qualifications for taking a promotional examination; (2) the relative weight to be attached to each method of examination; and (3) the use and determination of monitors for written, oral and performance examinations").[5]

These civil service rules, as modified by any applicable collective bargaining agreements, effectuate the important social goal of creating a public workforce outside of the system of political patronage that dominated before the reforms adopted more than a century ago. The overlay of the examination

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[4] Potential applicants have also brought lawsuits in advance of the administration of employment examinations. See, *e.g.*, *Nolan* v. *Hillard*, 722 N.E.2d 736 (Ill. App. Ct. 1999) (successful pre-administration challenge to educational prerequisite for sitting a police sergeant examination).

[5] The City of New Haven's collective bargaining agreement with its firefighters stipulated that promotions were to be made based on an examination with written and oral components, weighted 60% and 40% respectively. Pet. App. 606a.

requirement of Title VII and other employment protections, however, poses special challenges for state and local governments.

B. Municipalities Frequently Face The Threat Of Title VII Disparate Impact Claims By Disappointed Applicants.

This Court has recognized that merit-based employment criteria may violate Title VII's disparate impact principle. *E.g.*, *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971). Municipalities are eager to comply with their anti-discrimination obligation, for several reasons. As government entities, they have a special obligation to ensure that their actions are consistent with all applicable requirements; as representatives of diverse constituents, their hiring processes must be above challenge on grounds of favoring one group over another; and as employers, they want to be sure that their hiring and promotion processes produce the very best candidates. Ensuring that their statutorily-required merit hiring criteria satisfy these obligations is an important, and ongoing, priority for all government entities.

A local government reviewing the results of a employment test may conclude, either on its own or as a result of complaints that it receives, that the disparate impact among racial, gender, or ethnic groups triggers concern about whether the test satisfies Title VII and the other imperatives just discussed. In that situation, the local government may decide that it is appropriate voluntarily to discard the test results and substitute a revised test designed to better accomplish its objectives.

Municipalities' hiring criteria—particularly the use of examinations—also are regularly tested in

court by disappointed applicants. Invoking Title VII's disparate impact prong, plaintiffs frequently claim that merit-system examinations fall short of providing "a reasonable measure of job performance," and so fail to "measure the person for the job and not the person in the abstract." *Griggs*, 401 U.S. at 436. The result often has been costly litigation and delays in filling important government positions.

The legal standards governing disparate impact claims are not at all precise. A plaintiff must show that the challenged employment practice "causes a disparate impact on the basis of race, color, religion, sex, or national origin"; the burden then switches to the employer to prove that "the challenged practice is job related for the position in question and consistent with business necessity." 42 U.S.C. § 2000e-2(k)(1)(A)(i). If the employer makes that showing, the plaintiff still may prevail by showing that the employer refuses to utilize an alternative method that has less of a disparate impact and serves the employer's legitimate interests. *Id.* § 2000e-2(k)(1)(A)(ii) & (C).

The result of these standards is that if the complaint contains a credible allegation of a disparate impact, the claim is likely to proceed to discovery. That, of course, is where the lion's share of litigation costs are incurred. See *Bell Atlantic Corp.* v. *Twombly*, 127 S. Ct. 1955, 1967 (2007) (noting Advisory Committee on Civil Rules estimate that "discovery accounts for as much as 90 percent of litigation costs when discovery is actively employed"); *Intel Corp.* v. *Advanced Micro Devices, Inc.*, 542 U.S. 241, 268 (2004) (Breyer, J., dissenting) (citing survey suggesting 60% of *all* litigation costs are attributable to discovery).

The likelihood of a plaintiff being able to meet the threshold necessary to obtain discovery—and perhaps even to take to trial—a disparate impact claim relating to a competitive examination has been enhanced significantly by the approach taken by the Equal Employment Opportunity Commission (EEOC) and other federal agencies charged with enforcing Title VII in their Uniform Guidelines on Employee Selection Procedures ("Guidelines"). 29 C.F.R. § 1607.[6] Indeed, the EEOC cautions that the use of examinations to make hiring, promotion, and other employment decisions is a "practice to which the disparate impact principle frequently is applied." *EEOC Compliance Manual*, No. 915.003, § 15-28 (Apr. 19, 2006), available at http://www.eeoc.gov/policy/docs/race-color.pdf.

The Guidelines—mirroring the statutory disparate impact standard—state that an examination implicates the disparate impact principle when it adversely affects a particular racial, gender, or ethnic group by producing "[a] substantially different rate of selection in hiring" or promotion that disadvantages that group. 29 C.F.R. § 1607.16B. To help employers determine when an exam adversely affects a group, the EEOC Guidelines establish a "four-fifths" rule of thumb. 29 C.F.R. § 1607.4D. Under that rule, an examination is presumed to have an adverse impact if the ratio of minority test-takers eligible for appointment to a position is less than 80% (four-

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[6] The Guidelines were jointly issued by EEOC, the Department of Justice, the Department of Labor, and the Civil Service Commission (now the Office of Personnel Management). They "are not administrative regulations" but "are 'entitled to great deference.'" *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 431 (1975) (citing *Griggs*, 401 U.S. at 433-434).

fifths) of the ratio of non-minority test-takers so eligible. *Ibid.*[7]

The fourth-fifths rule of thumb is not simply a possible trigger for federal enforcement action; it also provides disappointed applicants with a strong basis for threatening litigation challenging a municipality's use of a particular examination. And the chances are strong that a lawsuit alleging a violation of the four-fifths rule would not be dismissed at the pleading stage, and therefore would trigger significant litigation burdens, disruption of employment processes, and adverse publicity for the defendant municipality.[8]

The threat of disparate impact litigation involving competitive examinations is not at all hypothetical. Municipalities have faced a considerable number of disparate impact claims based on examinations brought by disappointed minority applicants. See, *e.g.*, *Lewis* v. *City of Chi.*, 528 F.3d 488 (7th Cir. 2008) (African American firefighters challenged promotion exam); *Adams* v. *City of Chi.*, 469 F.3d 609 (7th Cir. 2006) (minority police officers challenged

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[7] Suppose 120 applicants took an examination, and that 48 out of the 80 white applicants had scores making them eligible to be hired, while 12 out of 40 black applicants would be eligible. The "selection rate" for white applicants is 60% (48/80), while the rate for black applicants is 30% (12/40). The black selection rate is one-half of the white selection rate. Where that ratio is lower than four-fifths, an examination fails the EEOC's rule of thumb.

[8] The four-fifths rule is not a binding standard for determining whether a plaintiff has satisfied his or her initial burden in a disparate impact case (see *Watson* v. *Fort Worth Bank & Trust*, 487 U.S. 977, 995 n.3 (1988)), but it does provide a powerful argument against dismissal of a case on the pleadings.

lenged promotion exam); *Gulino* v. *New York State Educ. Dept.*, 460 F.3d 361 (2d Cir. 2006) (African American and Latino teachers challenged use of standardized certification test); *Isabel* v. *City of Memphis*, 404 F.3d 404 (6th Cir. 2005) (African American police officers claimed discriminatory promotions); *Allen* v. *City of Chi.*, 351 F.3d 306 (7th Cir. 2003) (minority police officers challenged promotions process); *Johnson* v. *City of Memphis*, 73 Fed. Appx. 123 (6th Cir. 2003) (African American and Hispanic patrol officers claimed section of promotion exam was reweighed to adversely affect minorities); *Bryant* v. *City of Chi.*, 200 F.3d 1092 (7th Cir. 2000) (African American and Latino officers challenged promotion exam); *Firefighter's Inst. for Racial Equal.* v. *City of St. Louis*, 220 F.3d 898 (8th Cir. 2000) (African Americans challenged promotional test); *Mems* v. *City of St. Paul, Dep't of Fire and Safety Servs.*, 224 F.3d 735 (8th Cir. 2000) (African American firefighters challenged promotion exam); *St. Louis Fire Fighters Ass'n Int'l Ass'n of Fire Fighters Local 73* v. *City of St. Louis*, 96 F.3d 323 (8th Cir. 1996) (challenge to promotion exam as having an adverse impact on African Americans); *Bridgeport Guardians, Inc.* v. *City of Bridgeport*, 933 F.2d 1140 (2d Cir. 1991) (minority police officers challenged promotion exam); *Black Law Enforcement Officers Ass'n* v. *City of Akron*, 824 F.2d 475 (6th Cir. 1987) (African American officers challenged promotion policy and exam); *Gilbert* v. *City of Little Rock*, 799 F.2d 1210 (8th Cir. 1986) (African American officers challenged promotion exam); *Fudge* v. *City of Providence Fire Dept.*, 766 F.2d 650 (1st Cir. 1985) (African American candidate challenged hiring exam for firefighting training academy); *Kirkland* v. *New York State Dep't of Corr. Servs.* 711 F.2d 1117 (2d Cir. 1983) (minority

correction officers filed class action challenging promotional exam); *Wilmore* v. *City of Wilmington*, 699 F.2d 667 (3d Cir. 1983) (minority firefighters challenged promotion exams); *Hood* v. *New Jersey Dep't of Civil Serv.*, 680 F.2d 955 (3d Cir. 1982) (challenge to civil service exam by African American and Hispanic applicants for fire department); *Ass'n Against Discrimination in Employment* v. *City of Bridgeport*, 647 F.2d 256 (2d. Cir. 1981) (African American and Hispanics challenged hiring exam for fire department); *Guardians Ass'n of New York City Police Dep't* v. *Civil Serv. Comm'n*, 630 F.2d 79 (2d Cir. 1980) (African American and Hispanics challenged police department hiring exam).

* * *

This Court must take account of these very significant practical realities as it considers the standards advanced by the parties in this case.

C. Petitioners' Rigid Rule Effectively Eliminates Municipalities' Ability To Avoid Litigation Over Employment Decisions And Will Increase Their Costs As Well As The Delays In Filling Positions.

Petitioners' principal contention (Br. 43, 46) is that a local government may decline to use the results of an examination only if it is certain that use of the results would violate Title VII. Alternatively, they assert (Br. 49) that a "strong basis in evidence" for a Title VII violation is necessary.[9] Those stan-

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[9] Petitioners also assert (Br. 43, 46, 49) that Title VII requires an employer to use the results of an examination even if the examination violates Title VII. We agree with the United States (Br. 4, 13) and respondents (Br. 15-18) that this argument can-

dards are inconsistent with this Court's precedents (see pages 32-33, *infra*), and—if adopted—would produce draconian practical consequences for municipal employers.

Under petitioners' approach, a municipality would be virtually unable to avoid litigation with respect to a dispute over the validity of an examination. Agreeing to devise a new examination in order to compromise a claim by minority applicants challenging a test on disparate impact grounds would subject the municipality to liability in an action by majority applicants eligible for appointment on the basis of the disputed test—the latter group would assert that no Title VII violation, or "strong basis in evidence" of a violation had been made.

Municipalities therefore would be forced to defend any examination they administer—no matter how unjustifiable the questions contained in the exam; no matter how disparate the burden on a particular racial, gender, or ethic group; and no matter how easily an alternative test with a significantly reduced disparate impact could be devised. Failing to dispute the disparate impact plaintiffs' claim of discrimination would simply produce a new lawsuit challenging the municipality's decision to compromise. Only in the unlikely situation in which the applicants eligible for hiring or promotion under the disputed examination agreed with the challengers that the examination should be discarded would the municipality be free to act without seeing the litigation through to completion.

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not be reconciled with the statutory text or this Court's decisions construing Title VII.

Petitioners' alternative "strong basis" standard does nothing to address this problem. It would be impossible for a municipality to determine in advance whether a particular set of facts will subsequently be found to constitute a "strong basis." Indeed, given its indeterminate nature, that standard probably would be *more* likely to provoke litigation in the event a municipality decided to compromise a disparate impact claim.

The additional burden that petitioners' rule would impose on municipalities is quite substantial. This Title VII litigation is fact-intensive and expensive to defend. Especially when the plaintiff is able to show that the examination results violate the EEOC's four-fifths rule, the chances are slim of obtaining a defense judgment before full discovery is completed. All sides typically will be able to find testifying experts to both "validate" and "invalidate" the test in relation to the relevant job-related criteria, as well as to argue, respectively, that there is not, or there is, an alternative available that will produce a lesser disparate impact. See *In re Chi. Police Officer Promotions*, 1994 WL 424146 (N.D. Ill. Aug. 11, 1994) (noting that the City had never successfully defended a promotion test resulting in racially disparate impact on the basis of job-relatedness or overall validity); see also *Allen*, 351 F.3d 306; *Hamer* v. *City of Atlanta*, 872 F.2d 1521 (11th Cir. 1989); *Rivera* v. *City of Wichita Falls*, 665 F.2d 531 (5th Cir. Unit A Jan. 1982).

The history of litigated cases shows that expanding municipalities' litigation burdens to include *virtually every case in which there is a dispute*, will divert significant government resources into litigation—Title VII employment discrimination cases can

run for years even when employers prevail. See, *e.g.*, *Lewis*, 528 F.3d 488 (involving eleven years of litigation over the fire department's hiring plan); *Allen*, 351 F.3d 306 (involving five years litigation over the police department's written test); *Chi. Firefighters Local 2* v. *City of Chi.*, 249 F.3d 649 (7th Cir. 2001) (involving fourteen years of litigation over the City's affirmative action plan); *Bryant* v. *City of Chi.*, 200 F.3d 1092 (7th Cir. 2000) (involving five years of litigation over whether the City could use an alternative hiring procedure).

The potential number of such claims is enormous. As we have discussed, municipalities make millions of hiring and promotion decisions each year, and most involve merit-based decisionmaking using techniques such as examinations. Under petitioners' view of the law, every disparate impact claim challenging an examination must be litigated to conclusion—or the municipality would face a lawsuit from those seeking to retain the examination.

This diversion of resources will have especially severe consequences, given the profound impact of the current financial crisis on state and local governments. States face a budget shortfall of billions of dollars—as much as 17% of their ordinary budgets—now, a shortfall projected to get worse in the next two fiscal years. See Elizabeth McNichol & Iris J. Lav, Ctr. on Budget & Policy Priorities, *State Budget Troubles Worsen*, at 1 (Mar. 13, 2009), http://www.cbpp.org/files/9-8-08sfp.pdf. The aggregate state budget shortfall is estimated at $350-370 billion through fiscal year 2011. *Id.* at 2. In response to this extraordinary budget pressure 83% of cities have cut expenditures and services; 69% have already laid off employees. Chris Hoene, Nat'l League of Cities,

Fiscal Outlook for Cities Worsens in 2009 at 1 (Feb. 2009), http://www.nlc.org/ASSETS/1F73FD6DD09249DB9B2FD014AA4D9C16/CFC_InterimSurvey_09.pdf.

While the lawsuits proceed, moreover, the local government may be precluded from filling the affected positions, with significant adverse effects on the delivery of important public services. Although the municipality may contest preliminary injunctive relief on the ground that filling the vacant positions is essential to the public interest, there is no certainty that a court will agree with the local government's submission that the public interest outweighs the plaintiff's interest in maintaining a job opening.

Finally, requiring that the issue be litigated to a judgment in every case prevents the political process from seeking to resolve more expeditiously what can often be a difficult and inflammatory issue. In its role as both employer and sovereign, government must take care to structure its actions with the utmost fairness towards its individual employees and towards its citizens at large, with a special sensitivity towards the underlying and fundamental goals of equality and accountable government. The time-consuming nature of litigation means that these potentially quite divisive issues instead will fester while the litigation proceeds.

This is not to say that the political process should be free of any constraints in resolving these sorts of disputes. The Court's precedents impose clear limits, as we discuss below (at pages 34-35)—particularly the prohibition against disparate treatment imposed by Title VII. But petitioners' approach requires government employers to continue blindly to defend every examination they administer no matter how

clear it becomes that the examination was improper under Title VII.

The Court therefore should adopt a legal standard that accords municipalities reasonable flexibility in determining how to address claims that examinations are invalid under Title VII's disparate impact principle. Upholding petitioners' proposed rule would impose new, and potentially very substantial, costs as well as other burdens on the many government entities that are required by law to use employment or promotion examinations.

D. Neither The Equal Protection Clause Nor Title VII Support Petitioners' Rigid Rule.

Petitioners' legal argument rests entirely on their assumption (*e.g.*, Br. 19, 23) that any decision relating to employment that is in any way motivated by race is subject to strict scrutiny under the Equal Protection Clause and constitutes disparate treatment in violation of Title VII.

If petitioners were correct, however, a government decision to undertake facially neutral measures specifically to increase the number of minority job applicants or the number of minority contractors bidding on a project would be unlawful. After all, a government decision to undertake those efforts indisputably would be race conscious in that the government's purpose would be increasing the number of *minority* applicants.

A plurality of this Court reached precisely the opposite conclusion in *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469 (1989). After holding invalid, under strict scrutiny review, a statute reserving a fixed percentage of government contracts to minority

contractors, the plurality observed that the City of Richmond could, without incurring strict scrutiny review, eliminate "formal barriers to new entrants" that "may have a disproportionate effect on the opportunities open to new minority firms"; the "elimination or modification" of those procedures "would serve to increase the opportunities available to minority business without classifying individuals on the basis of race." *Id.* at 510 (O'Connor, J., joined by Rehnquist, C.J., and White and Kennedy, JJ.).

Justice Kennedy's controlling opinion in *Parents Involved in Community Schools* v. *Seattle School District No. 1*, 127 S. Ct. 2738, 2792 (2007), also rejects the approach advocated by petitioners, stating:

> In the administration of public schools * * * it is permissible to consider the racial makeup of schools and to adopt general policies to encourage a diverse student body, one aspect of which is its racial composition.

Examples of such "race-conscious" policies cited by Justice Kennedy included "strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; [and] recruiting students and faculty in a targeted fashion." *Ibid.*

The Court's decisions under the Voting Rights Act reflect the same principle, acknowledging that "[s]trict scrutiny does not apply merely because redistricting is performed with consciousness of race." *Bush* v. *Vera*, 517 U.S. 952, 958 (1996) (plurality opinion); see also *League of United Latin American Citizens* v. *Perry*, 548 U.S. 399 (2006) (State's dismantling of a majority-minority district unconstitu-

tional on the grounds that it contravened the political identity that minority voters had found within that district); *Bartlett* v. *Strickland*, No. 07-689 (Mar. 9, 2009).

And Members of the Court have indicated that a facially race-neutral college admission standard—such as a rule guaranteeing admission to a fixed percentage of the top graduates from each high school within a State—is not subject to strict scrutiny even though it is adopted for the race-conscious purpose of achieving diversity in the student body. *Grutter* v. *Bollinger*, 539 U.S. 306, 361-362 (2003) (Thomas, J., joined by Scalia, J., concurring in part and dissenting in part); *Gratz* v. *Bollinger*, 539 U.S. 244, 297-298 (2003) (Souter, J., joined by Ginsburg, J., dissenting).

These decisions provide considerable guidance regarding the line between government actions that are presumptively permissible and those that are subject to strict scrutiny. *First*, the presence of a race-conscious motivation for the government action is not sufficient by itself to trigger strict scrutiny. As Justice Kennedy stated in *Parents Involved*, "a constitutional violation does not occur whenever a decisionmaker considers the impact a given approach might have on students of different races." 127 S. Ct. at 2792; see also *ibid.* (stating with respect to specific "race conscious" government actions listed as examples that "it is unlikely any of them would demand strict scrutiny to be found permissible"); *Bush* v. *Vera*, 517 U.S. at 958 (plurality opinion) (same).

Second, it is the nature of the government action that is the critical factor. Where a government action directly and explicitly singles out particular individuals—"treating each [person] in different fashion solely on the basis of a systematic, individual typing

by race" (*Parents Involved*, 127 S.Ct. at 2792 (Kennedy, J.)—it triggers strict scrutiny. Accord, *id.* at 2797 ("To be forced to live under a state-mandated racial label is inconsistent with the dignity of individuals in our society."); *Croson*, 488 U.S. at 510 (plurality opinion) (O'Connor, J., joined by Rehnquist, C.J., and White and Kennedy, JJ.) ("classifying individuals on the basis of race"). If, by contrast, the government "mechanisms * * * do not lead to different treatment based on a classification that tells each student he or she is to be defined by race," they do not trigger strict scrutiny. *Parents Involved*, 127 S.Ct. at 2792 (Kennedy, J.).[10]

One important consideration in determining the category in which a challenged government action falls is whether it is a classification "based on racial typologies" that "can cause a new divisiveness." *Parents Involved*, 127 S.Ct. at 2797 (Kennedy, J.).

Application of these principles in the employment context leaves no doubt that an employer's decision to replace one test with another because of a reasonable belief that the first test violated the disparate impact principle is not subject to strict scrutiny and does not violate Title VII. Of course, if the proffered purpose is shown to be a pretext, and the employer actually was engaged in intentional racial discrimination—for example, to prevent the hiring of any employees of a particular race—then the employer will have violated Title VII and, if state action is involved, the Equal Protection Clause as well. See

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[10] The mere fact that a challenged government action may have a disparate impact is not sufficient to invoke strict scrutiny. *Washington* v. *Davis*, 426 U.S. 229, 248 (1976).

St. Mary's Honor Ctr. v. *Hicks*, 509 U.S. 502, 511 (1993).[11]

1. The Equal Protection Clause does not subject to strict scrutiny review a reasonable effort to ameliorate an examination's disparate impact.

A reasonable decision by a government employer not to make hiring or promotion decisions on the basis of a competitive examination because of that examination's disparate impact on the basis of race, gender, or ethnicity—and instead to administer a new examination designed to ameliorate the disparate impact of the first test—is fundamentally different from the actions at issue in *Croson* and *Parents Involved*.

The decision to administer a new test is not a final decision regarding the plaintiffs' entitlement to

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[11] Much of the discussion in petitioners' brief relates to claims that respondents' actions were politically motivated, in violation of Connecticut's civil service law. See, *e.g.*, Br. 5-6. But that provides no justification for upholding a challenge based on Title VII or the federal Constitution, especially because Connecticut—like other States (see pages 10-11, *supra*)—provides its own remedy for violations of civil service procedures. See, *e.g.*, *Kelly*, 881 A.2d at 978 (challenging the new methodology of rounding exam scores as violations of the civil service laws and the City's Charter); *Hurley* v. *City of New Haven*, 2006 WL 1609974 (Conn. Super. May 23, 2006) (seeking declaratory relief and an injunction against the entry-level hiring practices that allegedly violate the City's Charter); *Henry* v. *Civil Service Comm'n*, 2001 WL 862658 (Conn. Super. July 3, 2001) (contending hiring process violated the City's Charter and seeking injunctive relief); *Bombalicki* v. *Pastore*, 2001 WL 267617 (Conn. Super. Feb. 28, 2001) (asserting that the failure to promote the plaintiff to the rank of lieutenant in the New Haven Police Department violated the City's Charter).

the government benefits they seek. In contrast to the students and contractors in those cases, who had been denied admission to the schools of their choice and the contracts for which they competed, plaintiffs here remain just as eligible to obtain the promotions as any other applicant taking the revised examination.

It therefore is impossible to conclude that an employer's decision to conduct a second examination "treat[s] each [person] in a different fashion solely on the basis of a systematic, individual typing by race." *Parents Involved*, 127 S. Ct. at 2792 (Kennedy, J.). To the contrary, the decision treats each person in the same manner, requiring—as well as permitting—every single applicant to take the revised examination to be eligible to be hired or promoted.

Any "labeling" that occurs here relates to the test (and its potential violation of the disparate impact principle), not to the individual applicants. The government's conclusion that the test should not be used because of *the test's* disparate impact says nothing about the individuals who took the test, especially because each individual will compete on a level playing field in taking the revised test. And this Court's decisions make clear that the fact that the government decision is race conscious is not sufficient to trigger strict scrutiny.

Dramatic adverse consequences would result from application of strict scrutiny to modification of an incomplete government decisionmaking process—maintaining all applicants' ability to compete on a level playing field—in a reasonable effort to eliminate a potential legal infirmity that could invalidate that process. Governments would effectively lose their ability to adjust flawed decisionmaking proc-

esses once underway, because of the high hurdle erected by the strict scrutiny standard, and would be forced instead to follow them to conclusion, face the inevitable lawsuit and associated costs, and revise the process only after a judicial determination of wrongdoing. That not only would impose large costs, but also reduce if not eliminate municipalities' ability to correct their own mistakes.

What if a government employer seeking to fill a position not subject to an examination requirement found after conducting a round of interviews that the top five candidates were all men? On petitioners' theory, the employer could not engage in additional, targeted outreach to obtain additional female applicants without satisfying strict scrutiny review. As here, the top candidates would have been identified and the new government process could displace any or all of them from their ranking. Presumably, petitioners' rule would bar that process adjustment as well—even though the five finalists would compete on an equal basis with any additional female candidates. Such a straitjacket makes no sense, and is not required by the Equal Protection Clause.

Moreover, it is petitioners' strict scrutiny approach—and not the government decision to revise the test—that would "cause a new divisiveness" if endorsed by this Court. *Parents Involved*, 127 S.Ct. at 2797 (Kennedy, J.). The demanding strict scrutiny standard would not apply to a local government's decision not to use an examination for other reasons—for example, a conclusion that it failed to test appropriately for an important qualification or that there had been some breach in security, or that there were no longer sufficient funds available to fill the rele-

vant positions.[12] Only decisions to try to reduce a disparate impact on a particular racial, gender or ethnic group would be affected. That would send a strongly negative message to persons who are members of those groups.

Petitioners contend (Br. 25-26) that strict scrutiny must apply because those applicants ranked the highest based on the results of the examination here are identifiable individuals who will lose their ranking if the government is permitted to utilize a revised test. Because the government decision to revise the examination rests on the race of these individuals, the argument goes, strict scrutiny must apply.

The flaw in this contention is that all of the government actions not subject to strict scrutiny discussed above also affect particular individuals. When the government draws the geographic lines that allocate students among a district's schools, the decision to place the boundary on one street rather than another may well be based on the desire to increase one

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[12] Civil service commissions have broad authority to set aside examinations for a variety of reasons. 3 Eugene McQuillin, *The Law of Municipal Corporations* § 12.78.15 (2008) ("If it is determined by the commission that an examination did not afford the applicants a fair opportunity to demonstrate their abilities, the commission may cancel the examination [and] request the director of civil service to hold a new examination."); *DiRado* v. *Civil Service Comm'n*, 224 N.E.2d 193, 195 (Mass. 1967) (commission may cancel an examination that "did not afford the applicants a fair opportunity to demonstrate their abilities"); see also 2 John Martinez & Michael Libonati, *Local Government Law* § 10:17 (2008) ("Error in the conduct of an examination may be cured by ordering another examination or by ordering the acceptance of alternative answers."); *Katz* v. *Hoberman*, 272 N.E.2d 81 (N.Y. 1971) (cancellation of a promotional examination using questions previously made public).

school's minority population and to decrease the minority population of the neighboring school. The affected students are identifiable—they are the residents of the houses and apartment buildings on the blocks allocated to the first school rather than to the second. But the facts that those students are identifiable, and that the government decision was based in part on those students' race, does not subject the boundary-drawing decision to strict scrutiny.

The same analysis applies to the decision to place a special "magnet" program in one school rather than in another. The placement decision may be based on the racial composition of the two schools: The school district may conclude that putting the program in school A rather than school B is appropriate because—in light of the racial composition of school A—the students attracted by the program will produce a more diverse student body.

In that example, the government decision rests on the racial composition of school B's students (and of school A's students), both identifiable groups of individuals. But that fact does not subject the decision to strict scrutiny.

The very same arguments apply to political districting. Under petitioners' approach, because it is possible to identify the particular individuals affected by a decision to place a district line in one place rather than another, that decision should be subject to strict scrutiny. But that rationale would apply to all districting, and completely overturn this Court's determination that mere consciousness of

race in districting decisions is *not* sufficient to trigger strict scrutiny review.[13]

A related aspect of petitioners' argument is their focus on the decision to replace an examination that had been administered. Petitioners appear to recognize (Br. 41) that—prior to administering a test—a government employer may seek to determine whether the examination would have a disparate impact on the basis of race, gender or ethnicity and, if such an impact is indicated, revise the examination to ameliorate it. Once the test is administered, however, they assert that any decision not to utilize its results must be reviewed under a strict scrutiny standard.

But petitioners' argument would mean that a school district's decision to redraw school boundaries in order to maintain diverse student bodies in individual schools in light of changing residential patterns also would trigger strict scrutiny review. After all, that decision would transfer identifiable students from one school to another based on the racial composition of the blocks on which the students live. And the same conclusion would apply to a decision to move a special "magnet" program from one school to another based on diversity considerations.

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[13] The relatively small number of applicants who took the test at issue here is not typical of the government employment setting. Hundreds, and sometimes thousands, of applicants sit for particular competitive examinations administered by some local governments. Just as the applicability of strict scrutiny review is not affected by the fact that students may be more "identifiable" with respect to some changes in geographic boundaries in small school districts, it should not be affected by the relative "identifiability" of the individuals here.

Because all existing schools by definition have an assigned geographic area from which they draw their students (other than schools whose student bodies are based on non-geographic criteria), that result would as a practical matter mean that strict scrutiny review would apply to *any* redrawing of such lines. That is precisely the opposite of Justice Kennedy's conclusion in *Parents Involved*. And that same conclusion would apply with respect to the redrawing of legislative districts as well, because such revisions also move particular individuals from one district to another. Under petitioners' approach, the principle endorsed by the plurality in *Bush* v. *Vera* would be a dead letter.

2. *Title VII's disparate treatment provisions do not prohibit voluntary compliance with the statute's own disparate impact principle.*

Title VII's prohibition of employment decisions "because of [an] individuals' race, color, religion, sex, or national origin," 42 U.S.C. § 2000e-2(a)(1), is not violated by an employer's reasonable decision to revise an examination in order to avoid its invalidation under Title VII's disparate impact principle for the same reasons that such a decision does not trigger strict scrutiny review.

Congress included both disparate treatment and disparate impact prohibitions together, in the same piece of legislation. Because "[s]tatutes must 'be read as a whole,'" *United States* v. *Atlantic Research Corp.*, 127 S. Ct. 2331, 2336 (2007) (quoting *King* v. *St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991)), the Court should not interpret one part of Title VII to prohibit the operation of another part. Yet that is the essence of petitioners' claim.

As we have explained, however, the decision to ameliorate the disparate impact of an examination—and allow all applicants to retake the revised test—is not discrimination based on race under this Court's precedents. For the same reasons it does not trigger Title VII's disparate treatment prohibition.

Moreover, employers need some latitude to decide whether or not to incur the large sums associated with defending a test in court, including hiring experts to "validate" the test. That need is especially acute because the uncertainty surrounding Title VII litigation means that even a test validation does not always shield employers from Title VII disparate impact liability. *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 429-432 (1975) (holding that the use of a validated test violated Title VII's disparate impact prohibition).

Especially because "on numerous occasions [the Court has] recognized that Congress intended voluntary compliance to be the preferred means of achieving the objectives of Title VII," *Local No. 93, Int'l Ass'n of Firefighters* v. *City of Cleveland*, 478 U.S. 501, 515 (1986), it would render Title VII incoherent to read the disparate treatment prohibition to outlaw voluntary compliance with the statute's disparate impact provisions. See U.S. Br.10-15.

3. *An employer that invokes ameliorating an examination's disparate impact as a pretext for denying a job or promotion based on an applicant's race is subject to liability under Title VII and, if a state actor, the Constitution.*

Neither a plaintiff nor a court is required to take at face value an employer's claim that its decision not to certify the results of an examination was because it wished to ameliorate the disparate impact of the examination by utilizing a revised examination instead. As in other contexts, the plaintiff may seek to show that the justification advanced by the employer is a pretext and that the employer's actual motivation was to deny a job or promotion to particular applicants because of those applicants' race. *St. Mary's Honor Ctr.*, 509 U.S. at 511; cf. *Johnson* v. *Transp. Agency*, 480 U.S. 616, 626 (1987) (if the employer invokes its affirmative action plan as the basis for its decision, "the burden shifts to the plaintiff to prove that the employer's justification is pretextual").

To prevail on such a theory here, petitioners would be required to prove that respondents' purpose in fact was *not* to substitute a test with a lesser disparate impact in order to avoid a lawsuit claiming that the test violated Title VII or to increase the possibility of obtaining a more diverse workforce.

Evidence relevant to such a claim would include proof that the decisionmaker had no reason to believe that the discarded test had a disparate impact on one or more racial, gender, or ethnic groups or that the decisionmaker had no reason to believe that it was possible to devise a test with less of a dispa-

rate impact. For example, evidence that the employer had discarded a previous test for the same reason, devised and administered a substitute test, achieved similar results, and now sought to discard the substitute test might—without more—undercut the proffered motivation. Evidence that the employer had not even considered whether an alternative test might be available also might be probative on this point.

If petitioners were able to make that showing, they also would be obligated to demonstrate that respondents' actual purpose was the intentional discrimination prohibited by the Constitution—refusing to promote applicants of a particular race so respondents could reserve the promotions only for applicants of another race.

We agree with respondents (Br. 36-39) that petitioners have not carried their burden of proof here. If the Court were to reach a contrary conclusion, the appropriate course would be to remand the case for further proceedings limited to the pretext claim.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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MARCH 2009

124 (34) (34)

Nos. 07-1428, 08-328

FILED
FEB 26 2009
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

FRANK RICCI, ET AL.,
Petitioners,

v.

JOHN DESTEFANO, KAREN DUBOIS-WALTON, THOMAS UDE, JR., TINA BURGETT, BOISE KIMBER, MALCOLM WEBER, ZELMA TIRADO, AND CITY OF NEW HAVEN,

Respondents.

On Writs of Certiorari
to the United States Court of Appeals
for the Second Circuit

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QUESTIONS PRESENTED

1. When a content-valid civil-service examination and race-neutral selection process yield unintended racially disproportionate results, do a municipality and its officials racially discriminate in violation of the Equal Protection Clause or Title VII when they reject the results and the successful candidates to achieve racial proportionality in candidates selected?

2. Does an employer violate 42 U.S.C. §2000e-2(*l*), which makes it unlawful for employers "to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race," when it rejects the results of such tests because of the race of the successful candidates?

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INTEREST OF *AMICI*

Amici Brian T. Fitzpatrick, Lino A. Graglia, Gail Heriot, George R. La Noue, Nelson Lund, Kenneth L. Marcus, Abigail Thernstrom, Stephan Thernstrom and Eugene Volokh are professors of law, history, political science and public policy who have written on, and care deeply about, the development of civil rights law and the application of the Equal Protection Clause in the Fourteenth Amendment to the Constitution. They respectfully submit this brief as *amici curiae* in support of the Petitioners.[1,2]

They submit this brief to emphasize the critical nature of this case and the importance of the Court's decision and to explain why they believe the

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[1] Pursuant to Rule 37, the parties have consented to the filing of this brief; their letters of consent are on file with the Clerk of the Court. In accordance with Rule 37.6, *amici* state that no counsel for either party has authored this brief in whole or in part, and no person or entity, other than *amici*, has made a monetary contribution to the preparation or submission of this brief.

[2] Brief *vitae* of the amici are contained in the Biographical Addendum appended hereto.

district court erred and fundamentally misconstrued this Court's teachings on equal protection.[3]

STATEMENT OF THE CASE

In 2003, 118 applicants took an examination administered by the New Haven Fire Department ("NHFD") for promotion to the ranks of captain and lieutenant. Forty-one applicants – twenty-five whites, eight blacks, and eight Hispanics – took the examination for captain. Seventy-seven applicants – forty-three whites, nineteen blacks, and fifteen Hispanics – took the examination for lieutenant. The examination scores and New Haven's established protocol for civil service promotions (the "rule of three") made it likely that "no blacks and at most two Hispanics would be eligible" for promotion to captain and that no blacks or Hispanics would be promoted to the rank of lieutenant. *Ricci v. DeStefano,* No. 04cv1109, at 3 (D. Conn. Sept. 28, 2006) Pet.App. at 7a.

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[3] We refer to the reasoning of the district court because a panel of the court of appeals affirmed in a summary order containing a single substantive paragraph. *Ricci v. DeStefano,* 530 F.3d 87 (2d Cir. 2008). The panel withdrew its summary order and filed a *per curiam* opinion adopting *in toto* the reasoning of the district court. *Ricci v. DeStefano,* 530 F.3d 88 (2d Cir. 2008).

In early 2004 the New Haven Civil Service Board ("CSB") held hearings to determine whether to certify the examination results and promote candidates based on those results. The City of New Haven (the "City" or "New Haven") expressed displeasure at the racial distribution of the examination scores and rankings and the CSB decided not to certify the examination results and no candidates were promoted.

The examinations rejected by the CSB had been composed and validated by New Haven's own testing consultants based on EEOC-recommended practices. Pet.App. 3 16a-3 17a, 329a-335a. See 29 C.F.R. §§1607.5, 1607.14, 1607.16 (providing that content-validity is established by thorough job analyses and identification of essential KSAs).[4] The consultant engaged in a thorough job analysis – using questionnaires, interviews, and "ride-along" exercises with incumbent firefighters and officers to identify the importance and frequency of essential job tasks; minority incumbents were intentionally overrepresented in the samples used in these processes. Pet.App. 150a-154a, 262a-264a, 338a-343a, 597a-650a.

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[4] "KSA" is the acronym in industrial psychology and employment testing for "Knowledge, Skills, & Abilities."

The consultant and City officials made extensive efforts to devise a content-valid and comprehensive oral assessment process for candidates to be rated by panels of fire-service professionals; minorities were overrepresented on all of the three-member oral assessment panels – each of which included two minority members and only one non-minority member. Pet.App. 162a-165a, 268a-270a, 344a-345a, 654a-661a. Post-examination assessments concluded that the panel ratings were consistent and reliable. Pet.App. 164a-168a, 269a-271a, 656a-657a, 661a-663a.

The City's chief civil service examiner testified that she found no flaws in the written examinations or any unfairness in the oral panels' ratings. CA2 J.A. 1243-1244, 1259-1260, 1268.

Candidates of all races passed both exams and were eligible for promotion. Pet.App. 428a-436a. However, the scoring results revealed racial disparities in pass rates and in scores on KSAs. Pet.App. 423a-427a, 950a-957a. Because of the small number of immediate vacancies, applying the rule-of-three meant, according to Respondents, that no African-Americans could be immediately promoted and the new lieutenants "will all be white."[5] Two Hispanics would be among the eight

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[5] Additional lieutenant vacancies arose after the examination that would have allowed three Afri-

(continued...)

promoted to Captain. Pet.App. 439a-445a, 475a-476a.

There is no dispute that the City's reasons for not certifying the examination results were related to the racial distribution of the results. *See Ricci,* No. 04cv1109, at 20-21, Pet.App. 24a-25a. According to the district court, the City's reasons for disregarding the examination results included: (1) the fact that the test would have promoted a smaller percentage of African-American and Hispanic applicants than had taken the examination; (2) promoting from the examination would undermine the City's goal of diversity in the Fire Department; (3) promoting from the examination would not provide enough "role models" for aspiring firefighters; (4) hiring from the list would subject the City to public criticism and political discomfort; and (5) using the list would subject the City to Title VII lawsuits from minority applicants that, also for political reasons, the City did not want to defend. There is also no dispute that Respondents were not relying on an affirmative action plan and were not acting to remedy prior discrimination.[6] Pet.App. 938a-945a.

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[5](...continued)
can-Americans to be promoted. Pet.App. 235a-236a, 305a-306a.

[6] Respondents were not attempting to achieve racial diversity in the officer ranks,

(continued...)

Eighteen candidates -- seventeen whites and one Hispanic -- brought an action in the U.S. District Court for the District of Connecticut. They alleged that the City and several municipal officials violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution, and other provisions of federal and state law by disregarding the results of the examinations that produced "too many" eligible white candidates and "too few" eligible non-white candidates. On cross-motions for summary judgment, the district court granted defendants' motion for summary judgment and denied plaintiffs' motion.

The district court held that Respondents had not violated Petitioners' rights under the Equal Protection Clause for two reasons. The district court

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[6](...continued)
Pet.App.1013a-1037a, notwithstanding the district court's attribution of this motivation to them. Even if diversity were a compelling interest (which this Court has not held it to be beyond the narrow confines of higher education, *see Grutter v. Bollinger*, 539 U.S. 306,339 (2003)), and even if the City asserted "diversity" as the reason for its action, the City did not explore race neutral alternatives to rejecting the list with predominantly white eligibles that would achieve diversity. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 127 S.Ct. 2738, 2760 (2007).

first held that the City's rejection of the examination was a race-neutral action because the test was administered in the same manner for all applicants and because the City discarded the scores of all exam-takers. Pet.App. 45a-46a. Although the district court acknowledged that even facially race-neutral decisions can violate Equal Protection if they are motivated by a discriminatory purpose, the district court nonetheless went on to hold that Petitioners could not show such purpose here as a matter of law because "[n]othing in the record in this case suggests that the City defendants or CSB acted 'because of' discriminatory animus toward plaintiffs or other non-minority applicants for promotion,'" *id.* at 43. Because the City's rejection of the examination constituted race-neutral action that was not motivated by a discriminatory purpose, the district court held that the City's action did not need to be tested under this Court's strict scrutiny analysis.

The Court of Appeals affirmed the district court in a *per curiam* opinion in one short paragraph, adopting *in toto* the district court's reasoning. 530 F.3d 88 (2d Cir. 2008).

SUMMARY OF THE ARGUMENT

This case presents the opposite scenario of the usual challenge to an employment or promotional examination: Petitioners do not attack the use of allegedly racially discriminatory exam results, but,

rather, challenge Respondents' reason for their "refusal to use the results." *Ricci,* No. 04cv1109 at 22, Pet.App. 25a.

Amici submit that New Haven's refusal to promote the Petitioner firefighters because of their race violated the Equal Protection Clause. Such race-based government action is fundamentally inconsistent with this Court's settled understanding of the Equal Protection Clause. This Court has consistently subjected such action to strict scrutiny, invalidating it in all but the rarest of circumstances. *See, e.g., Adarand Constructors, Inc.* v. *Pena,* 515 U.S. 200, 224 (1995).

The City's refusal to promote Petitioners was not a race neutral action. It was grounded solely on the racial distribution of the test results, and, as such, it was race-based government action. Indeed, all of the reasons Respondents offered for failing to utilize the City's own examination are based on Petitioners' race. As such, the district court should have applied strict scrutiny to the City's decisions.

Even if the City's action was in some sense facially race-neutral, this Court has held that race-neutral action can be subjected to strict scrutiny if it was motivated by a discriminatory purpose. The district court's holding that only racial animus can count as a discriminatory purpose ignored countless decisions by this Court to the contrary. That is, whether or not the City's action is considered facially

race-neutral, strict scrutiny should have been applied in this case.

We agree with Petitioners' argument that Respondents' action cannot survive strict scrutiny and that the city did not offer a compelling interest to justify its race- based action. Moreover, the remedy selected by the city – cancelling the promotions across the board – was not narrowly tailored to achieve any compelling interest.

Allowing Respondents to cancel the promotions after the administration of a fair and job-related test designed to identify qualified candidates, simply because of the successful candidates' race and Respondents' associated race-based concerns, would allow overt racial balancing, de facto quotas, and race politics in government hiring, all consequences the Court has repeatedly condemned in other contexts.

ARGUMENT

A. The City's refusal to promote from the examination was not a race-neutral action.

Petitioners' claim that the City's decision to discard the examination results was race-based discrimination in violation of the Equal Protection Clause because it was undertaken solely to reduce the number of high-scoring white applicants and increase the number of eligible non-white candidates.

This Court has addressed a government entity's claim that race-based decisions were necessary to redress a racial imbalance in the closely analogous context of government contracts. In *City of Richmond v. J. A. Croson Co.*, the Court held that: "[w]hile there is no doubt that the sorry history of both private and public discrimination in this country has contributed to a lack of opportunities for black entrepreneurs, this observation, standing alone, cannot justify a rigid racial quota in the awarding of public contracts . . ." 488 U.S. 469, 499 (1989). The Court further observed that:

> [W]hen a legislative body chooses to employ a suspect classification, it cannot rest upon a generalized assertion as to the classification's relevance to its goals. A governmental actor cannot render race a legitimate

> proxy for a particular condition merely by declaring that the condition exists. The history of racial classifications in this country suggests that blind judicial deference to legislative or executive pronouncements of necessity has no place in equal protection analysis.

Id. at 500-01 (internal citations omitted).

When a state [or local] government explicitly classifies its citizens by race, a court will examine that action using the "strict scrutiny" standard under the Equal Protection Clause. *Adarand Constructors v. Pena*, 515 U.S. 200, 227 (1995). A court must strike down the government action unless the state actor can prove that it acted to further a compelling interest and that action was "narrowly tailored" to achieve that interest. *Id.*; *Gratz v. Bollinger*, 539 U.S. 244, 266 (2003).

"[W]henever the government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection." *Adarand*, 515 U.S., at 229-230.[7] Petitioners were refused promotions

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[7] *Adarand* "established three general propositions with respect to governmental racial classifications."

(continued...)

because too many were white. The promotions were due under the city's charter and civil service rules. Pet.App. 74a-87a, 99a-114a. Every reason advanced

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[7](...continued)

> First, skepticism: Any preference based on racial or ethnic criteria must necessarily receive a most searching examination. Second, consistency: The standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefitted by a particular classification, *i.e.*, all racial classifications reviewable under the Equal Protection Clause must be strictly scrutinized. Third, congruence: Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment. Taken together, these three propositions lead to the conclusion that *any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny.*

Adarand, 515 U.S. 200, 223-24 (1995) (quotation marks, internal citations, and brackets omitted) (emphasis added).

by Respondents to justify aborting the promotions was based on the race of the successful candidates – too many were white.

Because race-related reasons were the only reasons Respondents offered, the City's rejection of the examination was not in any sense race-neutral.

The district court's ruling rested in part on the premise that "where a test is administered and scored in the same manner for all applicants, plaintiffs cannot make out a claim that the exam was a facially neutral test used in a discriminatory manner." *Ricci,* No. 04cv1109, at 42, Pet.App. 45a-46a. But the Petitioners did not contend that the "administration" or "scoring" of the test was discriminatory. Rather, the Petitioners contended that the City's *rejection* of the test was discriminatory. The City's decision to do so was based on the racial distribution of the results. As such, it was not racially neutral and it can only be sustained if it can survive this Court's strict scrutiny test. If it were otherwise, municipal employers could reject the results of an employment examination whenever those results failed to yield a desired racial outcome, which is nothing less than a racial quota. Racial quotas, or any race-based government action -- are impermissible under the Constitution unless the action is narrowly tailored to serve a compelling government interest.

B. The District Court incorrectly held that the City had to show "animus" toward whites in order to manifest a discriminatory purpose.

Even if the City's rejection of the examination were treated as race-neutral action, the district court was still incorrect in holding that the rejection need not be analyzed under this Court's strict scrutiny test. This Court has held that even race-neutral actions are to be subjected to strict scrutiny under the Equal Protection Clause if the actions were motivated by a discriminatory purpose. "A facially neutral law . . . warrants strict scrutiny . . . if it can be proved that the law was 'motivated by a racial purpose or object.'" *Hunt v. Cromartie*, 526 U.S. 541, 546 (1999). The district court held that -- as a matter of law -- the City had not acted with a discriminatory purpose because it had not acted with racial "animus" and this lack of "animus" immunized Respondents' actions. The district court fundamentally misunderstood this Court's discriminatory purpose cases.

This Court has never held that governments act with a discriminatory purpose only when they act with animus towards a racial group. *See* B. T. Fitzpatrick, "Strict Scrutiny of Facially Neutral State Action and the Texas Ten Percent Plan," 53 BAYLOR L. REV. 289, 309 (2001) ("[I]t is irrelevant whether the state actors harbor ill will or animus towards a particular race when passing legislation."). Rather, the Court has held that

government action motivated by a desire to engineer results to achieve a particular racial outcome constitutes action with a discriminatory purpose. *Id.* This Court has held this even in contexts where it was undisputed that the governments had no animus towards any racial group, but, like the City here, were only trying to help historically underrepresented racial groups.

These holdings can be seen most clearly in this Court's cases on racially gerrymandered voting districts. In these cases, the Court has held that the creation of the voting districts was facially race-neutral because they categorized voters by location rather than race. *See, e.g., Hunt v. Cromartie*, 526 U.S. 541, 547 (1999) ("Districting legislation ordinarily, if not always, classifies tracts of land, precincts, or census blocks, and is race-neutral on its face."). Nonetheless, the Court analyzed the cases under strict scrutiny—and has struck down several voting districts—because the districts were drawn with the purpose of engineering a particular racial distribution of voters. *See Miller v. Johnson*, 515 U.S. 900, 911 (1995) (striking down voting districts because "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district").

In all of these cases this Court applied strict scrutiny even though the voting district lines were drawn, just as the City's promotion decision was made here, with the purpose of *benefitting*

historically underrepresented racial groups. *See, e.g., Hunt v. Crormartie*, 526 U.S. 541, 546 (1999) ("A facially neutral law . . . warrants strict scrutiny if it can be proved that the law was 'motivated by a racial purpose . . .'"(quoting *Miller v. Johnson, infra*); *Miller v. Johnson*, 515 U.S. 900,911(1995); *Shaw v. Reno*, 509 U.S. 630, 643 (1993) (applying strict scrutiny to racial gerrymandering because strict scrutiny applies "not only to legislation that contains explicit racial distinctions but also to . . . statutes that, although race neutral, are . . . 'unexplainable on grounds other than race.'"(quoting *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977)). This Court did not rely on any notion that the voting districts were drawn with an "animus" toward whites.[8] *See* B. T. Fitzpatrick, "Can Michigan Universities Use Proxies for Race After the

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[8] The principle is not limited to voting district cases. There was no animus on the part of the government actors in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), *Gratz* v. *Bollinger*, 539 U.S. 244 (2003) or in *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 127 S.Ct. 2738, 2760 (2007) (education cases), or in *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989) (government contracting). In those cases, policy decisions were made with insufficient concern for those injured but not with animus. New Haven's action is more like the racial politics in Richmond, condemned in *Croson*, and allowing such action to pass would vitiate the Equal Protection Clause.

Ban on Racial Preferences?," 13 MICH. J. RACE & LAW 277, 288 (2007) ("[T]he Supreme Court has already held that [facially race-neutral action] in order to benefit underrepresented racial groups must satisfy strict scrutiny in the same way [facially neutral action] in order to benefit whites must.").

The district court was therefore quite wrong when it held that strict scrutiny could be invoked under the Equal Protection Clause only if the City acted with animus toward white firefighters.

C. Respondents' Action Cannot Survive Strict Scrutiny.

The city did not offer a compelling interest to justify its race- based action. It did not claim it was attempting to remedy past official discrimination. The City's stated fear of Title VII litigation or liability based merely on unintentional numerical disparity is not a compelling interest, particularly when Respondents had no reason to think that the test was impermissibly discriminatory. Respondents' putative interest in avoiding political criticism could never be a compelling reason to racially discriminate. The purported interest of providing "role models" for minorities, which the district court wrongly attributed to Respondents, has already been rejected by this Court as a compelling interest. *Wygant* v. *Jackson Board of Educ.*, 476 U.S. 267, 276 (1986) (plurality opinion). Respondents denied that they were seeking "diversity," but in any event, diversity has never been (and should not now be)

accepted by this Court as a compelling interest in the government employment context. Finally, the remedy selected by the city – cancelling the promotions across the board – was not narrowly tailored to achieve any compelling interest.

CONCLUSION

Allowing Respondents to cancel the promotions after the administration of a fair and job-related test designed to identify qualified candidates, simply because of the successful candidates' race and Respondents' associated race-based concerns, would allow overt racial balancing, de facto quotas, and race politics in government hiring, all consequences the Court has repeatedly condemned in other contexts.

The district court's failure to engage in strict scrutiny of Respondent's action is fatal to its reasoning and its ruling. Its judgment, and the decision of the Court of Appeals for the Second Circuit affirming it, should be reversed.

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February 26, 2009

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Supreme Court, U.S.
FILED
MAR 25 2009
OFFICE OF THE CLERK

Nos. 07-1428 & 08-328

IN THE
Supreme Court of the United States

FRANK RICCI, et al.,
Petitioners,

v.

JOHN DESTEFANO, et al.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICI CURIAE* LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW; NATIONAL URBAN LEAGUE; NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE; AND THE EQUAL JUSTICE SOCIETY IN SUPPORT OF RESPONDENTS.

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QUESTIONS PRESENTED

1. Whether Respondents' failure to certify the results of promotional examinations violated the disparate treatment provision of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a).

2. Whether Respondents' failure to certify the results of promotional examinations violated 42 U.S.C. § 2000e-2(l), which makes it unlawful for employers "to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, an employment related test on the basis of race."

3. Whether Respondents' failure to certify the results of promotional examinations violated the Equal Protection Clause of the Fourteenth Amendment.

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STATEMENT OF INTEREST

The following *amici* submit this brief, with the consent of the parties, in support of Respondents' argument that declining to certify the test results did not violate Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, or the Equal Protection Clause of the Fourteenth Amendment. [1]

The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") is a tax-exempt, nonprofit civil rights organization that was founded in 1963 by the leaders of the American bar, at the request of President John F. Kennedy, in order to help defend the civil rights of minorities and the poor. Its Board of Trustees presently includes several past Presidents of the American Bar Association, past Attorneys General of the United States, law school deans and professors, and many of the nation's leading lawyers. The Lawyers' Committee, through its Employment Discrimination Project, has been continually involved in cases before the Court involving the proper scope and coverage afforded to federal civil rights laws prohibiting employment discrimination.

Established in 1910, the National Urban League is the nation's oldest and largest community-based movement devoted to empowering African

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[1] Counsel for *amici* authored this brief in its entirety. No person or entity other than *amici*, their staff, or their counsel made a monetary contribution to the preparation or submission of this brief. Letters of consent to the filing of this brief have been filed with Clerk of the Court pursuant to Supreme Court Rule 37.3.

Americans to enter the economic and social mainstream. Today, the National Urban League, headquartered in New York City, spearheads the non-partisan efforts of its local affiliates. There are over 100 local affiliates of the National Urban League located in 35 states and the District of Columbia providing direct services to more than 2 million people nationwide through programs, advocacy, and research. The mission of the Urban League movement is to enable African Americans to secure economic self-reliance, parity, power and civil rights. The Urban League seeks to implement that mission by, among other things, empowering all people in attaining economic self-sufficiency through job training, good jobs, homeownership, entrepreneurship and wealth accumulation and promoting and ensuring our civil rights by actively working to eradicate all barriers to equal participation in all aspects of American society, whether political, economic, social, educational or cultural.

The National Association for the Advancement of Colored People ("NAACP"), established in 1909, is the nation's oldest civil rights organization. The fundamental mission of the NAACP is the advancement and improvement of the political, educational, social, and economic status of minority groups; the elimination of prejudice; the publicizing of adverse effects of discrimination; and the initiation of lawful action to secure the elimination of age, racial, religious, and ethnic bias.

Equal Justice Society ("EJS") is a national civil rights organization comprised of lawyers,

scholars, advocates, and citizens that seeks to protect civil rights and promote equal opportunity for all through law and public policy, public education, and research. The primary mission of EJS is to combat the continuing scourge of racial discrimination and inequality in America. Consistent with that mission, EJS has filed and joined *amicus curiae* briefs before this Court to ensure that antidiscrimination law and jurisprudence continue to encourage and adequately provide opportunities to address racial and societal inequities.

SUMMARY OF ARGUMENT

By not adopting the results of a discriminatory promotional examination that demonstrated a gross adverse impact upon the minorities on the list, the Civil Service Board and the City of New Haven (hereinafter referred to as the "City") did not act in a manner which would require strict scrutiny review under the Equal Protection Clause. The City demonstrated a consciousness of the racial make-up of the promotional examination results and attempted to determine the legality of the examination. The City was not attempting to equalize the test scores through a race-based classification. Rather, the City tried to determine whether there was a less discriminatory promotional test to allow all applicants to equally compete for promotion. The Equal Protection Clause was not implicated by this action.

Similarly, the City was correct in refusing to certify the test results in an effort to comply with the requirements of Title VII. The primary objective of Title VII is to achieve equality of employment opportunities. Congress intended compliance with Title VII's objectives to be voluntary, as self-evaluation of employment practices reduces the risk of unnecessary litigation. Therefore, when faced with a test that undisputedly had a disparate impact on protected groups, rather than certifying the results and awaiting a certain lawsuit, the City appropriately undertook the proactive measure of not certifying a discriminatory promotional examination.

The Court has never found that acting with a consciousness of race in a matter that does not grant benefits because of a person's race triggers strict scrutiny nor violates Title VII unless the reason given is a pretext for intentional discrimination. The Court should decline Petitioners' requests to do so now. This country has made great strides in correcting past injustices and discrimination, and trying to provide true equal opportunity for all. Now is not the time to turn back the clock.

ARGUMENT

I. Simply Acting With A Consciousness Of Race–Which Does Not Provide Benefits Nor Disadvantage An Individual Because Of Race–Does Not Trigger Strict Scrutiny, Nor Does It Establish That Race Was An Improper Consideration Under Title VII.

A. The City's Decision To Decline To Certify The Results Of The Promotional Examinations Did Not Establish A Race-Based Classification That Requires Strict Scrutiny.

After the Court sifts through Petitioners' and supporting *amici*'s hollow claims of race-based classification, quotas, and racial balancing, what remains is Petitioners' failed plea for the application of strict scrutiny under the Equal Protection Clause. There is no doubt that the City was conscious that the recently developed promotional examination resulted in a disparate impact. However, consciousness of a disparate impact on a particular race, and taking the time to determine the legality of its application, is a far cry from Petitioners' claim that the City's action constituted a race-based classification triggering strict scrutiny. *See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S.Ct. 2738, 2788 (2007) (Kennedy, J., concurring in part and concurring in the judgment); *see discussion infra* Part I.B. Furthermore, Petitioners' examples of prior race-based classifications that have been invalidated by the Court provide no

authority for applying strict scrutiny in this case.[2]

The Court has consistently held that race-based classifications require strict scrutiny under the Constitution. Examples of actions where the Court found that there were race-based classifications, and on which Petitioners presently rely, include: reserving seats in an entering class based on the race of the applicant, *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 307 (1978); awarding extra points in a college admission process based on the race of the applicant, *Gratz v. Bollinger*, 539 U.S. 244, 271 (2003); creating special employment privilege for minorities when compared to treatment of non-minorities in layoff situations, *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 283-84 (1986); denying students' school transfer requests because of race, *Parents Involved*, 127 S. Ct. at 2738; and setting aside contracts for minority bidders, *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995).

In each of these cases, the Court focused on how minorities were treated differently from non-minorities. *See Bakke*, 438 U.S. at 289-90 ("The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal."). Thus, a racial classification was explicitly used as the basis for granting an individual request,

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[2] Petitioners and their *amici*, in over 400 pages of briefing, do not cite any Supreme Court or federal appellate cases holding that mere placement on a promotion eligibility list constitutes a race-based classification.

see, e.g., *Adarand*, *Bakke*, and *Parents Involved*, or for bestowing an added benefit, *see, e.g.*, *Gratz* and *Wygant*.

By contrast, an employer's attempt to determine whether there is a less discriminatory promotional test which would apply equally to all in the promotional pool does not confer any benefit or provide any preference based on race. *See* Br. for the United States as Amicus Curiae Supporting Vacatur and Remand, *Ricci v. DeStefano* (Nos. 07-1428 and 08-328) at 22-23. Each firefighter, regardless of race, will be evaluated based on his or her merit alone. *Cf. Grutter v. Bollinger*, 539 U.S. 306, 337 (2003) (recognizing the paramount importance of evaluating candidates as "individual[s] and not in a way that makes an applicant's race or ethnicity the defining feature").

There is no evidence in the record that members of a particular race will be given preferential treatment based upon their race on any future examination. *Cf. Wygant*, 476 U.S. at 270-71 (granting preferential protection against layoffs to minorities). Nor does an employer's mere consideration of whether there are less discriminatory ways of administering an examination deny any firefighter a promotional opportunity based on his or her race. *Cf. City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (use of specific minority set-asides prevented competition by non-minority contractors).

Petitioners claim that the decision to determine whether there are less discriminatory

methods of administering the examination is equivalent to race-balancing or a racial quota. *See, e.g.*, Petitioners' Brief on the Merits, at 23-24. Petitioners conspicuously fail to acknowledge that any reconsideration could still result in a promotional list with a comparable racial composition, or one with a similar composition, but which does not fail a legally actionable disproportionate number of minority firefighters. Indeed, the City is not seeking to implement an examination that would result in a certain number of promotions for minority candidates. Rather, the City merely seeks to provide all applicants a fair chance to be considered for promotion.

Additionally, Petitioners assert that "[t]he promotions were due under the city's charter and civil-service rules." Pet'rs' Br. at 23. To the contrary, the City's ranked eligibility list does not entitle[3] Petitioners to a promotion and the City's "rule of three" does not support this premise. *See* New Haven Charter, Article XXX, § 160. The extent of Petitioners' misplaced reliance is clearly illustrated by the plain text of the provision, which

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[3] Petitioners do not assert an entitlement-property interest in their putative promotions. *See* 3 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW, § 17.5(a) (4th ed. 2008) (noting that "the applicable federal, state or local law which governs the dispensation of the benefit must define the [property] interest in such a way that the individual should continue to receive it under the terms of the law"). No source of positive law guarantees these Petitioner firefighters a promotion; thus, they cannot be considered entitled to it under existing precedent. *Cf.* 57 AM. JUR. 2d § 593 ("[n]either a tentative offer of municipal employment . . . constitutes a property interest").

requires a promotion to "be filled from *among* the three individuals with the highest scores on the exam . . . ." *Ricci v. DeStefano*, 554 F. Supp. 2d 142, 145 (D. Conn. 2006) (emphasis added); *see Kelly v. New Haven*, 881 A.2d 978, 984, 993, 997-1001 (Conn. 2005) (quoting New Haven Charter, Article XXX, § 160) (analyzing the history of the "rule of three," and interpreting the relevant provision to mean that "promotions from the eligibility lists must be from among 'those applicants with the three highest scores'").

Assuming that Petitioner Ricci earned the top score on the examination, he is still not guaranteed a promotion. Applying the "rule of three," the City has the discretion to promote the second, then third, then fourth candidates and completely ignore Mr. Ricci. *See, e.g., Kelly*, 881 A.2d at 993-94 (using an identical hypothetical situation involving four candidates to illustrate the proper application of the "rule of three"). The "rule of three" simply requires the City to choose within a pool of three candidates, and a new pool is created after each promotion is made. *See id.*

Under the "rule of three," no single Petitioner is guaranteed a promotion. The District Court recognized this: "Given that there were 7 Captain vacancies . . . at most two Hispanics would be eligible for promotion, as the top 9 scorers included 7 whites and 2 Hispanics." *Ricci*, 554 F. Supp. 2d at 145. Even if the City had certified the promotional lists, it retains discretion under the "rule of three," and thus, Petitioners were not guaranteed promotions.

Finally, Petitioners assert that declining to certify the test results because the promotional list was predominantly white had a disproportionate impact on white candidates and therefore constituted unlawful discrimination. It is undisputed that more non-minority firefighters passed the test than minority firefighters. However, a government action that has a disproportionate impact on one group does not, on its own, automatically trigger strict scrutiny. *See Washington v. Davis*, 426 U.S. 229, 239 (1976) ("[O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact."). Simply arguing that non-minority firefighters suffer disproportionately because the results were not certified is insufficient to establish a racial classification.

Since Petitioners have not shown that the City's action amounted to a racial classification, this Court should not apply strict scrutiny. The City was not attempting to equalize the test scores through a race-based classification; it merely declined to certify the test results. In doing so, the City treated all the candidates equally.

B. Not All Actions That Involve Race Are Racial Classifications Under The Law.

Courts have recognized the critical difference between race-conscious and race-based actions. Justice Kennedy's concurrence in *Parents Involved*

addressed this issue directly in the educational context:

> School boards may pursue the goal of bringing together students of diverse backgrounds and races through other means, including strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race. These mechanisms are race conscious but do not lead to different treatment based on a classification that tells each student he or she is to be defined by race, so it is unlikely any of them would demand strict scrutiny to be found permissible.

Parents Involved, 127 S.Ct. at 2792 (Kennedy, J., concurring in part and concurring in the judgment). *See also Gratz*, 539 U.S. at 297-98 (Souter, J., joined by Ginsburg, J., dissenting) ("there is nothing unconstitutional" about "race conscious" university admission systems that guarantee admission to a fixed percentage of the top graduates from each high school).

Several Justices raised questions during oral argument in *Parents Involved* illustrating the difficulty in drawing the line between permissible race-conscious actions and unconstitutional racial

classifications. *See, e.g.*, Transcript of Oral Argument at 4-7 (Kennedy, J.), 18-19, (Roberts, C.J.), 21-22 (Scalia, J.), 23-24 (Souter, J.), *Parents Involved*, 127 S.Ct. 2738 (No. 05-908). In responding to hypotheticals about whether a school board could make a race-conscious decision when selecting a site for a new school, then Solicitor General Clement recognized that applying strict scrutiny was not proper when "a race-neutral government action [] doesn't classify people directly based on race..." Oral Argument of *Parents Involved* at 19.

Obviously, questions posed during oral argument merely serve as hypothetical scenarios to test the application of a legal theory. However, these questions do highlight the very real and practical difference between race-conscious actions and racial classifications. The Court has applied strict scrutiny when there are racial classifications, but not when there is simply action with consciousness of race. These questions draw attention to the important difference between treating all persons the same while being conscious of race, and basing decisions on race. Classic examples of impermissibly basing decisions on race include the ability to stay employed in *Wygant*, an award of points based upon race in considering university admission as in *Gratz*, or being permitted to attend a school of your choice as in *Parents Involved*. The City's decision not to certify the promotional examination is simply not that kind of race-based classification.

Indeed, in testing to determine promotional eligibility, the employer is creating a pool of applicants qualified to be promoted, much like a

hiring pool. Circuit courts have consistently refused to apply strict scrutiny to race-conscious outreach and recruitment programs that target minorities but do not grant racial preferences to employees. *See, e.g., Duffy v. Wolle*, 123 F.3d 1026, 1039 (8th Cir. 1997);[4] *Ensley Branch, NAACP v. Seibels*, 31 F.3d 1548, 1571, 1583 (11th Cir. 1994); *Sussman v. Tanoue*, 39 F. Supp. 2d 13, 25 (D.D.C. 1999), *aff'd* 64 Fed. Appx. 248 (D.C. Cir. 2003) (citing cases from the Seventh, Eighth, Eleventh and D.C. Circuits).[5] In the recruiting context, actions that use public funding to increase the number of minority applicants are not considered race-based actions.[6] *See, e.g., Peightal v. Metro. Dade County*, 26 F.3d 1545, 1558 (11th Cir. 1994) (referring to recruiting

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[4] "An inclusive [minority] recruitment effort enables employers to generate the largest pool of qualified applicants and helps to ensure that minorities and women are not discriminatorily excluded from employment . . . The only harm to white males is that they must compete against a larger pool of qualified applicants. This, of course, is not an appropriate objection, and does not state a cognizable harm." *Duffy v. Wolle*, 123 F.3d 1026, 1039 (8th Cir. 1997) (internal citations and quotation marks omitted).

[5] *But cf. Safeco Ins. Co. of Am. v. City of White House*, 191 F.3d 675, 692 (6th Cir. 1999) (recognizing that "where 'outreach' requirements operate as a *sub rosa* racial preference—that is, where their administration 'indisputably pressures' contractors to hire minority subcontractors–courts must apply strict scrutiny").

[6] Similarly, in the voting rights context, the Court has found considering race when drawing new electoral district lines does not automatically compel strict scrutiny. *See Bush v. Vera*, 517 U.S. 952, 958 (1996).

programs targeting "young minorities and women for firefighting positions" as "race neutral").

It is evident that the City acted to ensure equal opportunity for all qualified firefighters seeking promotion. The City acted in accordance with its legal obligation not to discriminate and explored less discriminatory alternatives in response to stark evidence of a disparate impact. This decision was made using aggregate test data, looking to the total pass-fail rate of the candidates, and responding according to the requirements of Title VII and EEOC Guidelines. *See* Br. for the United States as Amicus Curiae at 9, *Ricci v. DeStefano* (Nos. 07-1428 and 08-328) ("The [EEOC] Guidelines also state that an employer whose examination has an adverse impact should search for alternative selection devices with less adverse impact as part of the test-validation process.") (citing 29 C.F.R. 1607.3(B), 1607.15(B)(9), (C)(6) and (D)(8) (1978)). The City's response to the racial disparate impact of a promotional test did not constitute a racial classification.

Lower courts that have considered this issue have likewise recognized that actions made with a consciousness of race are distinct from race-based actions and do not require the application of strict scrutiny. *See, e.g.*, *Hayden v. County of Nassau*, 180 F.3d 42, 48 (2d Cir. 1999) (holding that construing a police entrance examination in an effort to avoid discriminatory effects "does not constitute a racial classification"); *Talbert v. City of Richmond*, 648 F.2d 925, 929 (4th Cir. 1981) (promoting an eligible black officer instead of an eligible white officer with

a better test score was not an equal protection violation because discriminatory intent was not shown); *Raso v. Lago*, 135 F.3d 11, 17 (1st Cir. 1998) (endorsing HUD's consideration of race, the demographics of the region, and federal and state law in conditioning the availability of federal funds to a particular housing area based on whether the area's renting policies ensured equal treatment). *But cf. Bushey v. N.Y. State Civil Serv. Comm'n*, 733 F.2d 220, 221-23 (2d Cir. 1984).[7]

After properly finding there was no explicit racial classification, the District Court correctly declined to apply strict scrutiny. *See Ricci*, 554 F. Supp. 2d. at 160-62. The Court then focused its analysis on Petitioners' Title VII claim of intentional discrimination. *See id.* at 151-53. As discussed in detail below, the Court found that Petitioners failed to prove that the City acted with an intentionally discriminatory purpose. *Id.* at 161-62.

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[7] The City's facially race-neutral actions must be distinguished from those in *Bushey* because neither minority nor nonminority candidates benefitted from the decision against certification. This is not a situation where "a state agency unilaterally [] decide[d] to use race-based criteria to favor minorities in employment decisions." *Bushey*, 469 U.S. at 1120 (Rehnquist, J. dissenting in denial of certiorari). Instead, the City did not increase minority scores, nor did it engage in racial balancing; it declined to certify a discriminatory examination and did not promote *any* candidates.

II. The Proper Legal Framework Was Applied To Petitioners' Claims By The Lower Courts.

In the absence of evidence directly showing the impermissible consideration of race, the District Court applied the burden-shifting framework of *McDonnell Douglas*, the well-worn standard used to prove intentional discrimination through inferential proof. *Id.* at 151-53 (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)). Under *McDonnell Douglas*, a prima facie case attempts to "rule out the most common reasons for adverse job actions," entitling the plaintiff who proves a prima facie case to a presumption that intentional discrimination has taken place. *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253-54 (citing *Int'l Bhd. of Teamsters v. U.S.*, 431 U.S. 324, 358 & n.44 (1977)). In order to avoid a directed verdict, the employer must then meet a burden of production by introducing evidence of a legitimate, non-discriminatory reason for its decision. *Id.* at 253-55. Once the employer has met its burden, the presumption of discrimination created by the prima *facie* case "drops from the case,"[8] and the plaintiff must prove that the employer's stated justification was pretextual for discrimination in order to prevail. *Id.* at 255 n.10. This is not a unique finding; trial

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[8] Petitioners and their *amici* mischaracterize the meaning of the prima facie case by stating the District Court found that race was a factor. *See, e.g.*, Pet'rs' Br. at 48. In *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 579 (1978), the Court made it clear that a "prima facie showing is not the equivalent of a factual finding of discrimination").

courts make this determination every day. These claims are often dismissed on summary judgment.[9]

In analyzing the pretext claim, the District Court found Petitioners' argument that there had been past certification of promotional examinations producing a "statistically adverse impact . . . insufficient in itself to show that defendants' concerns about complying with Title VII were pretextual." *Ricci*, 554 F. Supp. 2d at 154. The District Court also determined that the City need not "certify a test where they cannot pinpoint its deficiency explaining its disparate impact under the four-fifths rule simply because they have not yet formulated a better selection method." *Id.* at 156. Additionally, the Court found that the "[City's] motivation to avoid making promotions based on a test with a racially disparate impact . . . does not, as a matter of law, constitute discriminatory intent." *Id.* at 160 (footnote omitted). In the end, the District Court concluded that the reasons provided by the City could not be found to be pretext for unlawful race discrimination.[10]

Ultimately, the City declined to certify the list on the basis of legitimate, well-founded concerns

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[9] *See* Kevin M. Clermont & Stewart J. Schwab, *How Employment-Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 429, 444 (2004).

[10] Petitioners' attention to the hardships of several white candidates is at best misplaced and at worse misleading. *See, e.g.*, *Pet'rs' Br.* at 8 n.4 (citing Pet'rs' App. 375a-378a, 392a-398a, 402a-409a, 413a-419a). All candidates, regardless of race, were subjected to the same pressures and stress normally associated with a rigorous examination.

that certification of the test results would violate the City's obligations under Title VII, [11] which in turn, would expose the City to a valid Title VII claim by minority firefighters. Before hiring from a list with a stark disparate impact, the City sought to explore what options were available to avoid liability under Title VII.[12] This process would have included the continued exploration of lesser discriminatory alternatives. That exploration was cut short by Petitioners' insistence that the City had to hire off the list regardless of its racial composition.

The legal test consistently used by courts for proving unlawful discrimination takes into account the very concerns raised by Petitioners. Indeed, *McDonnell Douglas* provides a safeguard against the misuse of race to achieve some pre-conceived notion of racial balancing. The *McDonnell Douglas* framework requires that an employer account for its

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[11] Under Petitioners' view of the law, it seems employers could do nothing, even if the results had been entirely white – "the inexorable zero"–and where concerns existed about the validity of the test. *See Teamsters*, 431 U.S. at 342 n.23 (quotation marks and citation omitted). Yet, in such a situation, employers would be exposed to potential liability under an adverse impact claim, in addition to a class-wide treatment claim under *Teamsters*. *Id.*

[12] As the District Court noted, "it is necessarily undisputed that, had minority firefighters challenged the results of the examinations, the City would have been in a position of defending a test that, under applicable EEOC Guidelines, presumptively had a disparate racial impact." *Ricci*, 554 F. Supp. 2d at 153. Nevertheless, the City did not hastily discard the promotion examination results, but instead conducted extensive hearings and established a thorough evidentiary record on the issue of lesser discriminatory alternatives.

actions by "articulat[ing] some legitimate, nondiscriminatory reason." 411 U.S. at 802. *McDonnell Douglas* also ensures that an employee is "afforded a fair opportunity to show that [the employer's] stated reason for [its action] was in fact pretext." *Id.* at 804. This test is intended to prevent situations in which an employer would merely play with the numbers until it reached a certain preset result or "claim[] 'good faith' . . . to simply leapfrog from racial disparity directly to remedies that discriminate against nonminorities and establish de facto racial quota systems." Pet'rs' Br. at 55. If a fact-finder determined that these were the real reasons that the City refused to certify the test, there could be a finding of intentional discrimination.

The *McDonnell Douglas* analysis provides the vehicle to sort out legitimate motives from illegal motives. *See Burdine*, 450 U.S. at 253 (plaintiff must "prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination"); *Watson v. Forth Worth Bank and Trust*, 487 U.S. 977, 986 (1988) ("The plaintiff must prove by a preponderance of all the evidence in the case that the legitimate reasons offered by the defendant were a pretext for discrimination."). Here, the District Court simply found that there was insufficient evidence for a fact-finder to reasonably find unlawful discrimination. *Ricci*, 554 F. Supp. 2d at 160.

To be clear, an employer's unfounded fear of disparate impact exposure cannot justify crude

attempts to accomplish racial balancing. Such cases, if proven, should result in liability. Title VII and the Equal Protection Clause prohibit employers from altering test scores to attain a predetermined bottom line. However, that is not the case here. Rather than massaging the numbers behind closed doors, the City undertook a careful and public evaluation of the validity of its testing process and the availability of lesser discriminatory alternatives.

III. Adopting Petitioners' Arguments Would Discourage Voluntary Compliance By Employers, Which Is The Preferred Means Of Achieving The Objectives Of Title VII.

"As the Court observed in *Griggs v. Duke Power Co.*, 401 U.S., at 429-430, the primary objective [of Title VII] was a prophylactic one: 'It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees.'" *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975) (citing *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971)). The Court has "recognized that Congress intended voluntary compliance to be the preferred means of achieving the objectives of Title VII" and that to achieve voluntary compliance employers must "self-examine and self-evaluate their employment practices." *Local No. 93, Int'l Ass'n of Firefighters, AFL-CIO C.L.C. v. City of Cleveland*, 478 U.S. 501, 515 (1986); *Albemarle Paper*, 422 U.S. at 417-18 (internal citation omitted). *See also Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974). Voluntary compliance is premised on the theory that employers

are best positioned to observe factual circumstances and determine the applicable legal obligations. *See, e.g.*, *Wygant*, 476 U.S. at 290 (O'Connor, J., concurring) (recognizing that "[t]he value of voluntary compliance is [especially] important when it is a public employer that acts").

Under Title VII, an unlawful employment practice based on disparate impact is established if:

> (i)t is demonstrated that [an employer] uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the [employer] fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or (ii) [an alternative employment practice is available.]

42 U.S.C. 2000e-2(k). Consistent with the Congressional intent underlying Title VII and sound public policy, employers must be afforded an opportunity to "self-examine and self-evaluate" a testing process that causes a disparate impact. *Local 93*, 478 U.S. at 515. This opportunity allows employers to assess the availability of an alternative employment practice to determine whether a test is lawful under Title VII and whether voluntary compliance is necessary.[13] That is exactly what the

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[13] If an employer misuses this opportunity to mask a discriminatory intent, a fact-finder could readily infer intentional discrimination. In these cases, employers would be subject to not only lost wages, but also to compensatory and

City did in this case in an effort to comply with the dictates of Title VII.

The goals of Title VII are frustrated when employers are subject to claims prior to determining a comprehensive understanding of what voluntary compliance means. Prematurely allowing claims discourages voluntary compliance by employers. "This result would clearly be at odds with this Court's and Congress' consistent emphasis on 'the value of voluntary efforts to further the objectives of the law." *Wygant*, 476 U.S. at 290 (O'Connor, J., concurring) (internal citations omitted).

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possible punitive damages. *See* 42 U.S.C. § 1981a(a)(1) (allowing compensatory and punitive damages "[i]n an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964"). As compensatory and punitive damages are not available for disparate impact claims, employers have little incentive to abuse the opportunity to comply with the mandates of Title VII.

CONCLUSION

For the above reasons, the *amici* respectfully suggest that the judgment of the Second Circuit should be AFFIRMED.

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Nos. 07-1428 and 08-328

IN THE

Supreme Court of the United States

FRANK RICCI, ET AL., *Petitioners,*

v.

JOHN DESTEFANO, ET AL., *Respondents.*

On Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

BRIEF OF THE STATES OF MARYLAND, ALASKA, ARKANSAS, IOWA, NEVADA, AND UTAH AS *AMICI CURIAE* SUPPORTING RESPONDENTS

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INTEREST OF *AMICI CURIAE*

State and local governments employ more than 19 million public servants, of whom more than 5 million are State employees. *See* U.S. Census Bureau, *Federal, State, and Local Governments: Public Employment and Payroll Data*, Table 443, http://www.census.gov/govs/www/apes.html. As a major public employer, each State has an interest in maintaining the fairness and integrity of government employment practices, not only for the benefit of its employees, but also to earn and retain the trust of the public. *See Connick v. Myers* 461 U.S. 138, 150-51 (1983) (noting government's legitimate interest in "the effective and efficient fulfillment of its responsibilities to the public" and the promotion of "integrity in the discharge of official duties") (citation omitted).

Petitioners advance a novel proposition that, if adopted by the Court, would substantially impair that important governmental interest. Under Petitioners' theory, a public employee who receives a passing score on an eligibility test for a promotion thereby acquires a legally protected interest and potentially could prevent the government from deferring final action on the promotion for any of a variety of reasons. Such a rule would be a dramatic departure from the established law of employment discrimination. Its detrimental implications, moreover, could extend beyond personnel decisions to encompass other responsibilities of State government.

Each State must be able to evaluate its policies and programs in response to public (or intra-governmental) concerns, including concerns that such

policies or programs would violate federal law, and to make changes or corrections as necessary. Here, the perceived need for reconsideration of a promotional test involved personnel policies, but a similar necessity for remedial or prophylactic measures may arise in connection with a public procurement process or an agency rulemaking, for example.

Title VII "was not intended to 'diminish traditional management prerogatives'" in the manner that Petitioners suggest. *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 259 (1981) (quoting *Steelworkers v. Weber*, 443 U.S. 193, 207 (1979)). The Equal Protection Clause likewise "does not require '[t]his displacement of managerial discretion by judicial supervision.'" *Engquist v. Oregon Dep't of Agric.*, 128 S. Ct. 2146, 2157 (2008) (citation omitted). Amici States have a strong interest in the rule that neither Title VII nor the Equal Protection Clause prevents the government from treating all applicants for promotion equally, as New Haven did by deferring promotions in its fire department pending further consideration.

SUMMARY OF ARGUMENT

This case arises from the decision of the New Haven Civil Service Board, as a result of a tie vote among its members, not to certify the results of a promotional examination. If the test results had been certified, Petitioners would have been eligible for, but not entitled to, a promotion to the positions of captain or lieutenant in the New Haven Fire Department. The two board members who voted against certification stated, in casting their votes, that they were concerned about flaws in the examination

process and potential disparate impact liability under Title VII. The board's split decision on certification did not classify any candidate by race or adopt a system of racial classification for the making of promotions. The board's decision also did not result in any candidate being promoted, denied a promotion, or rendered ineligible for promotion.

Although the lower courts correctly recognized the limited nature of the decision at issue here, those courts did not fully consider whether the Civil Service Board's decision resulted in cognizable harm to Petitioners or constituted an "adverse employment action." Petitioners can satisfy neither of those requirements.

1. Petitioners lack standing to challenge the board's decision because that decision did not impose on them any concrete, particularized harm. Petitioners' anticipatory challenge to a *de facto* racial quota is not ripe; there is no evidence that any such quota has been adopted explicitly or implicitly, by the Civil Service Board or anyone else.

2. For similar reasons, the board's decision was not an adverse employment action. The decision did not, as Title VII requires, effectuate any material change in Petitioners' "compensation, terms, conditions, or privileges of employment." *See* 42 U.S.C. 2000e-2(a)(1).

Although the board's failure to certify the test results was "race-conscious" in the sense that some board members sought to avoid an unlawful racially disparate impact on the pool of eligible candidates, the decision did not result in the adoption of any racial classification and therefore does not trigger the application of strict scrutiny. A government agency's decision to put scheduled civil service promotions on

hold, so that it can consider whether its procedure for making the promotions would subject it to liability or whether a different procedure would yield greater racial diversity in its supervisory ranks,' falls well within the range of race-conscious measures that this Court has recognized as lawful.

3. As a practical matter, governments implementing complex administrative processes should be afforded wide latitude to pause and to start over. In matters of hiring and promotion, for example, notwithstanding government employers' determined efforts to prevent discrimination or other unfairness, social scientists have yet to agree upon a fool-proof method of detecting or eliminating all of the racial or cultural bias that may be encoded in a given set of examination questions or procedures. States and other government entities must be afforded sufficient flexibility to anticipate and respond to legitimate concerns about the fairness of an ongoing promotion process, *before* concerns about a possible disparate impact become a reality, and thereby become more difficult and costly to remedy.

Moreover, government decision-makers should not be subjected to a risk of liability that encourages them to conceal their true reasons for reconsidering or changing course. Citizens rightly demand transparency when, for example, the government engages in civil service hiring, in procurement, or in the promulgation of regulations. Penalizing a government that decides to start over, or merely pauses, in implementing such processes would discourage deliberation and transparency. Because a decision to start over or pause generally does not impose any concrete harm on anyone, a judicial challenge to such a decision ordinarily should not lie.

ARGUMENT

Article III of the Constitution requires that a party invoking federal court jurisdiction must allege an "actual or imminent" injury, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992), that is "personal, particularized, concrete, and otherwise judicially cognizable," *Raines v. Byrd*, 521 U.S. 811, 820 (1997). To the same effect, a claim for disparate treatment is cognizable under Title VII only if the plaintiff can show that he was subjected to an adverse employment action—a material change in the plaintiff's "compensation, terms, conditions or privileges of employment." *See* 42 U.S.C. 2000e-2(a)(1). In employment-discrimination cases brought pursuant to 42 U.S.C. § 1983, an adverse employment action likewise is generally recognized as a requisite element of a claim. *See St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506 n.1 (1993); *see also Crawford v. Carroll*, 529 F.3d 961, 970 (11th Cir. 2008); *Arendale v. City of Memphis*, 519 F.3d 587, 602-03 (6th Cir. 2008); *but see Power v. Summers*, 226 F.3d 815, 820-21 (7th Cir. 2000) (no adverse employment action required to state First Amendment claim for retaliation).

These basic principles have yet to be applied in earnest to Petitioners' case. The lower courts cursorily addressed the issue of standing, *see* Pet. App. 44a-45a, did not discuss ripeness, and never determined whether the requirement of an adverse employment action was satisfied, Pet. App. 19a. In fact, there was no judicially cognizable harm to Petitioners, nor any adverse employment action. Petitioners therefore lack standing to challenge the municipal decision at issue in this case; their claims

of racial discrimination in employ nent are not ripe; and they cannot state a claim under Title VII or the Equal Protection Clause.[1]

I. PETITIONERS' CLAIMS REST ON FEARS ABOUT FUTURE DISCRIMINATION THAT ARE NOT JUSTICIABLE AT THIS TIME.

A. Petitioners Were Not Denied a Promotion.

The governmental decision challenged in this case is a March 18, 2004 decision of the New Haven Civil Service Board not to certify the results of a fire department promotional examination. On a motion to certify the results, the board deadlocked, with two in favor, two against, and one member not voting. One of the two board members who voted not to

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[1] The issues of standing and ripeness are jurisdictional in nature and should be addressed by this Court *sua sponte*. *See, e.g., Arbaugh v. Y & H Corp.*, 546 U.S. 500, 506-07 (2006). If the Court nevertheless reaches the merits, the Court has discretion to consider whether the board decision at issue here was an adverse employment action, even though the issue was not litigated below. *See, e.g., Carlson v. Green*, 446 U.S. 14, 17 n.2 (1980). Because the lack of an adverse employment action is closely related to the jurisdictional issues, fundamental to the unavailability of any right of action under Title VII in this case, and susceptible of resolution on the present record, the Court should exercise its discretion to affirm on this alternative ground. *See, e.g., Griffin v. Potter*, 356 F.3d 824, 829 (7th Cir. 2004) (in Title VII case, affirming summary judgment for Postal Service on alternative ground, not reached by trial court, that there was no adverse employment action).

certify, Malcolm Webber, indicated that he "originally was going to vote to certify," but live testimony before the board gave him "great doubts about the test itself." Pet. App. 586a. Mr. Webber stated that "I will vote No on this motion in order to move forward a deeper research and a complete study of how we're giving these exams because of the complete and rather horrifying disparate result of this particular examination." Pet. App. 586a-87a. Zelma Tirado, who also voted not to certify, concluded after hearing the testimony that both the process and the test were flawed. Pet. App. 587a. The board's chair, Jim Segaloff, expressed similar concerns about the disparate impact of the exam but ultimately voted to certify, indicating that he was not persuaded "that there's going to be an exam designed that's going to be less discriminatory." Pet. App. 587a-88a.

As a result of the Civil Service Board's two-to-two vote, no firefighter was deemed eligible for promotion, and no one was promoted. The Board's vote did not deny a promotion to any of the Petitioners, nor did it render any Petitioner ineligible for promotion. The only effect of the vote was, as board member Webber indicated, to afford the city an opportunity "to move forward a deeper research and a complete study of how we're giving these exams." Pet. App. 586a.

Notwithstanding Petitioners' metaphors about "rolling the dice over and over again," Pet. Br. at 31, and "perennial mulligan right[s]," Pet. Br. at 63, this case actually involves an agency decision to defer the making of promotions on one occasion, because of concerns about liability for the racially disparate impact of the process the agency had created to identify candidates for promotion. This is not a case like *Griffin v. School Board of Prince Edward County*,

377 U.S. 218 (1964), in which a government entirely shut down a program in order to avoid desegregation and instead contributed public funds to a racially segregated private program. The Civil Service Board simply decided, by a tie vote, to defer making promotions while it grappled with the fact that potential flaws and inaccuracies in its examination could have resulted in an overwhelmingly white class of eligible candidates.

The record does not reflect any decision by New Haven as to how it ultimately will proceed to make promotions. There is no evidence that New Haven will employ a racial classification at that time. Every Petitioner apparently remains eligible to compete for any promotion, and there is no basis for speculating that promotions will be offered on anything other than a lawful basis.

Furthermore, the burden imposed on Petitioners by the Civil Service Board's non-certification could amount, *at most*, to a requirement that they take some additional step to remain candidates for promotion. The board's decision may impose no burden on Petitioners other than delay, inasmuch as New Haven might yet decide to deem some or all of the Petitioners eligible for promotion without asking anything further of them.

B. Petitioners Lack Standing.

At an "irreducible constitutional minimum," a plaintiff invoking federal court jurisdiction "must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560;

see also Raines, 521 U.S. at 820 ("personal, particularized, concrete, and otherwise judicially cognizable"). The Court thus held in *Adarand Constructors, Inc. v. Peña* that a subcontractor had standing to challenge a governmental incentive for hiring minority subcontractors because the racial classification at issue "prevent[ed] the plaintiff from competing on an equal footing." 515 U.S. 200, 210-12 (1995) (quoting *Northeastern Fla. Chapter Associated Gen. Contractors v. Jacksonville*, 508 U.S. 656, 667 (1993)).

As the D.C. Circuit has correctly recognized, there is a critical distinction between *actual* harm arising from an employer's decision to adopt an allegedly unconstitutional racial classification and *conjectural* harm arising from an employer's decision to do nothing. "Under *Adarand* . . . , the relevant consideration is whether the agency is sufficiently committed to a particular race-conscious policy that the plaintiff will likely face a career impediment." *Worth v. Jackson*, 451 F.3d 854, 859 (D.C. Cir. 2006); *see id.* at 860 (white male employee lacked standing to bring employment discrimination claim where there was "no statute, regulation, or written policy committing HUD to favoring minorities or women," and where employee "may never have to compete at a disadvantage for a new position").

For similar reasons, as the Tenth Circuit has recognized, an employer's alteration of a promotional process, even if for race-conscious reasons, does not result in a denial of an opportunity to "compete[] on an equal footing" under *Adarand* and *Associated General Contractors* if, as in this case, the alterations apply equally to everyone. *See Byers v. City of Albuquerque*, 150 F.3d 1271, 1275-76 (10th Cir. 1998)

(white male police officers lacked standing to challenge city's assertedly race-conscious decision to lower threshold scores and cut-offs in promotional process, where decision to lower thresholds applied equally to all candidates and benefited both white and minority candidates).

The Civil Service Board's decision not to certify the results of the promotional exam entailed no commitment to making race-conscious promotions. The board's deferral of promotions applied equally to all candidates and did not deny anyone an opportunity to compete on an equal footing. Any injury Petitioners suffered as a result of the board's split vote was neither concrete, nor particularized to them. Accordingly, there is no federal court jurisdiction to consider Petitioners' challenge to the decision.

C. Petitioners' Claims Are Not Ripe.

Petitioners may not at this time challenge a feared *future* decision by the board to adopt a racial classification in the promotional process. Ripeness doctrine "protect[s government] agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967). "A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998).

Petitioners anticipate that, when New Haven actually makes its next round of promotions to supervisory positions, they will not be permitted to

compete on an equal footing for those promotions. Petitioners repeatedly predict that the Civil Service Board's decision to defer the promotions will evolve into "a racial quota, reserving an easily determinable number of promotion slots for African-Americans." Pet. Br. at 61; *see also* Pet. Br. at 20 ("racial quotas"), 26 ("race-balancing quota"), 31 ("de facto quotas"). These are precisely the types of predictions that do not give rise to a ripe controversy.

Even if—contrary to all indications in the record—New Haven officials secretly plan to adopt a racial quota when the City ultimately makes firefighter promotions, no such decision has been "formalized," nor have the effects of such a decision been "felt in a concrete way by the challenging parties." *Abbott Labs.*, 387 U.S. at 148-49. The unconstitutional discrimination that Petitioners predict "may not occur as anticipated," and "indeed may not occur at all." *Texas v. United States*, 523 U.S. at 300; *see also Worth*, 451 F.3d at 861-62 (employee's challenge to alleged policy of favoring minorities and women in hiring and promotion, "absent concrete application of that policy," was not ripe for review). Petitioners' fears, however sincere, are not justiciable.

II. ANTI-DISCRIMINATION RULES DO NOT IMPOSE LIABILITY ON A GOVERNMENT AGENCY THAT DEFERS TAKING FINAL ACTION IN ORDER TO RECONSIDER THE DESIGN OF A PERSONNEL SYSTEM.

In this case, substantive law reinforces jurisdictional requirements. Even if Petitioners had standing (which they do not) and their case were ripe (which it is not), they have not stated a discrimination

claim under Title VII or the Equal Protection Clause of the Fourteenth Amendment.

A. A Decision To Defer Taking Employment Action Is Not an Adverse Employment Action Under Title VII.

The Civil Service Board's two-to-two vote on certifying the results of the promotional examination was not an adverse employment action and would not be treated as one under the decisions of any federal circuit.

An adverse employment action means "a *significant change in employment status*, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Patterson v. Johnson*, 505 F.3d 1296, 1298 (D.C. Cir. 2007) (emphasis added); *see Butler v. Alabama Dep't of Transp.*, 536 F.3d 1209, 1215 (11th Cir. 2008) ("a serious and material change in the terms, conditions, or privileges of employment"). "[T]he employee's subjective view of the significance and adversity of the employer's action is not controlling; the employment action must be materially adverse as viewed by a reasonable person in the circumstances." *Butler*, 536 F.3d at 1215.[2]

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[2] The Seventh Circuit, for example, has recognized "three general categories of actionable, materially adverse employment actions": (1) cases, including termination, in which the employee's "compensation, fringe benefits, or other financial terms of employment are diminished"; (2) cases involving a transfer in which the employee's career prospects are "likely to be stunted"; and (3) cases involving

The lower courts have addressed, and declined to classify as an adverse employment action, the sort of inconvenience that the board's decision imposes on Petitioners. In particular, the lower courts have rejected claims of an adverse employment action for "failure to promote" where, as here, the employer did not promote anyone, but instead deferred the plaintiff's prospects for promotion. *See, e.g.*, *Derrickson v. Circuit City Stores, Inc.*, 84 F. Supp. 2d 679, 694 (D. Md. 2000); *Locke v. Gas Research Institute*, 935 F. Supp. 994, 1002 (N.D. Ill. 1996); *cf. Rogers v. Alternative Res. Corp.*, 440 F. Supp. 2d 366, 372-73 (D.N.J. 2006) (under New Jersey Law Against Discrimination).

Although Petitioners repeatedly claim they were "denied [a] promotion," Pet. Br. at 3, 25, 43, no denial occurred in the relevant sense: Petitioners were not denied a promotion that their employer actually made or offered to someone else, where the successful and unsuccessful candidates were treated differently because of race. *See also Bowie v. Ashcroft*, 283 F. Supp. 2d 25, 31 (D.D.C. 2003) ("When a government agency cancels a vacancy announcement and no one outside the protected class is hired to fill the position, the plaintiff cannot establish her prima facie case.").

Even if Petitioners ultimately are required to take another test to remain eligible for promotion, such a requirement likewise would not constitute actionable harm. The courts of appeals uniformly hold that an employer's decision to require an employee to take a

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subjection to "humiliating, degrading, unsafe, unhealthful, or otherwise significantly negative alteration" in the employee's "workplace environment." *Nichols v. Southern Ill. Univ.-Edwardsville*, 510 F.3d 772, 780 (7th Cir. 2007).

test is not an adverse employment action. *See, e.g.*, *Hancock v. Potter*, 531 F.3d 474, 479-80 (7th Cir. 2008) (physical fitness-for-duty test); *Caver v. City of Trenton*, 420 F.3d 243, 256 (3d Cir. 2005) (psychological examination); *Schoffstall v. Henderson*, 223 F.3d 818, 825 (8th Cir. 2000) (fitness-for-duty examination); *Sullivan v. River Valley School Dist.*, 197 F.3d 804, 814 (6th Cir. 1999) (mental and physical examinations); *Benningfield v. City of Houston*, 157 F.3d 369, 376 (5th Cir. 1998) (psychological testing); *Hopkins v. Baltimore Gas & Elec. Co.*, 77 F.3d 745, 755 (4th Cir. 1996) (same).

Even where an employee alleged that a performance examination was administered under discriminatory conditions, the Seventh Circuit declined to hold that the examination requirement was an adverse employment action subject to scrutiny for a racially discriminatory motive. *See Bragg v. Navistar Int'l Transp. Corp.*, 164 F.3d 373, 376-78 (7th Cir. 1998) ("a supervisor's assessment of an employee's skills is not an adverse employment action").

The inconvenience Petitioners suffered in having to study for the promotional test is, moreover, even less than the inconvenience of other employer-imposed burdens, such as a transfer to another city, that generally do not rise to the level of an adverse employment action. *See, e.g.*, *Higgins v. Gonzalez*, 481 F.3d 578, 587 (8th Cir. 2007).

B. New Haven Permissibly Considered Race, Without Subjecting Petitioners to Group-Based Treatment or a Disproportionate Burden.

In addition to falling short of an actionable employment decision, New Haven's decision not to certify the results of the promotional exam presents the sort of policy determination that this Court has found substantively consistent with anti-discrimination guarantees. As the District Court found, "all the test results were discarded, no one was promoted, and firefighters of every race will have to participate in another selection process to be considered for promotion." Pet. App. 39a. Furthermore, under New Haven's civil service rules, no test-taker gained any legally protected interest in a promotion as a result of scoring well on the test. Pet. App. 42a. On these facts, no promotion-seeker suffered the sort of individualized harm that defines an equal protection or Title VII violation under this Court's cases.

Anti-discrimination rules "protect *persons*, not *groups*." *Adarand Constructors*, 515 U.S. at 227 (emphasis in original); *see Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U. S. 701, 127 S. Ct. 2738, 2757 (2007) (plurality opinion) ("[A]t the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class." *Miller v. Johnson*, 515 U. S. 900, 911 (1995)); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 528 (1989) (Kennedy, J., concurring) ("The relevant proposition is not that it was blacks, or

Jews, or Irish who were discriminated against, but that it was individual men and women.").

Anti-discrimination protections thus are triggered when a particular individual "is disadvantaged by the government because of his or her race." *Adarand*, 515 U.S. at 230. In other words, the protections take hold when a racial classification "helps" members of one race and "hurts" members of another. *Id.* at 241 n.* (Thomas, J., concurring in part and concurring in the judgment); *see also Seattle Sch. Dist. No. 1*, 127 S. Ct. at 2751 (strict scrutiny applies "when the government distributes burdens or benefits on the basis of individual racial classifications").

Even if a racial classification causes individualized injury, moreover, the government's program may be lawful in its full context. *See Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) ("Context matters when reviewing race-based governmental action under the Equal Protection Clause."). Specifically, the Court has found unacceptable those racial classifications that foreclose "individualized consideration" of personal qualifications, while approving race-conscious approaches that leave room for individualized consideration. The construction set-aside in *Croson*, for example, failed the narrow-tailoring requirement of strict scrutiny because "a successful black, Hispanic, or Oriental entrepreneur from anywhere in the country enjoys an absolute preference over other citizens based solely on their race." 488 U.S. at 508.

Similarly, in *Gratz v. Bollinger*, 539 U.S. 244 (2003), the Court drew upon Justice Powell's principal opinion in *Bakke* when emphasizing "the importance of considering each particular applicant as an individual, assessing all of the qualities the

individual possesses." *Id.* at 271 (discussing *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978)). The numbers-based undergraduate admissions plan in *Gratz* failed Fourteenth Amendment scrutiny precisely because it did "not provide such individualized consideration." 539 U.S. at 271.

In *Grutter*, by contrast, the University of Michigan Law School's lawful admissions program gave "some attention to numbers" in the selection process, but "remain[ed] flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application." 539 U.S. at 336 (internal quotation marks omitted), 337.

So too, in the employment area, this Court upheld a female worker's selection for promotion to a dispatcher position under an affirmative action plan that required female employees "to compete with all other qualified applicants. *No* persons are automatically excluded from consideration: *all* are able to have their qualifications weighed against those of other applicants." *Johnson v. Transportation Agency*, 480 U.S. 616, 638 (1987).

These decisions show that there is no *per se* prohibition on considering race somewhere in the course of a governmental process: What matters is that the affected individual must have a real chance to obtain the desired government benefit on his or her own merits. *Compare Grutter*, 539 U.S. at 339 (rejecting view that race may never be "outcome determinative"), *and Seattle Sch. Dist. No. 1*, 127 S. Ct. at 2753 ("The point of the narrow tailoring analysis in which the *Grutter* Court engaged was to ensure that the use of racial classifications was

indeed part of a broader assessment of diversity, and not simply an effort to achieve racial balance."), *with Gratz*, 539 U.S. at 274 (individualized review was "the exception and not the rule" and came only after race had been applied as "a decisive factor for virtually every minimally qualified underrepresented minority applicant"), *and id.* at 280 (O'Connor, J., concurring) (deeming individualized consideration "necessary" and noting that "the current [undergraduate selection] system . . . is a nonindividualized, mechanical one").

The nature of the challenged governmental action also factors into the equation. Of direct relevance here, the plurality opinion in *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), distinguished between the impermissible plans for laying off teachers that were at issue in that case, and the "valid *hiring* goals" that had been approved in earlier cases. *Id.* at 282 (plurality opinion) (emphasis in original). Hiring goals, the plurality stated, "simply do not impose the same type of injury that layoffs impose. Denial of a future employment opportunity is not as intrusive as loss of an existing job." *Id.* at 282-83; *see id.* at 283 ("While hiring goals impose a diffuse burden, often foreclosing only one of several opportunities, layoffs impose the entire burden of achieving racial equality on particular individuals, often resulting in serious disruption of their lives.") (footnote omitted). *Cf. Seattle Sch. Dist. No. 1*, 127 S. Ct. at 2794 (Kennedy, J., concurring) (distinguishing mandatory public school assignments from "the context of college admissions where students had other choices").

By all these measures, New Haven's refusal to certify the firefighter test results does not constitute

unlawful discrimination. No firefighter lost a job to achieve race-conscious objectives. No individual suffered a special disability or stigma as a result of New Haven's decision. No one was subjected to a quota system or denied individualized consideration in a final selection process. Petitioners might still secure the promotions they seek. The Civil Service Board simply decided that, for the moment, there would not be promotions for anyone.

The opinions in *Seattle School District No. 1* highlight the difference between the facts here, and facts that would constitute unlawful discrimination. Writing for the plurality, the Chief Justice emphasized in the *Seattle* case that it is not necessarily an equal protection violation for a local government to take steps that "avoid racial imbalance," particularly where, as here, the governn.ent eschews incorporating "express racial classifications" into its programs. 127 S. Ct. at 2762 n.16 (discussing *School Comm. of Boston v. Board of Educ.*, 352 Mass. 693, 227 N. E. 2d 729 (1967), *appeal dismissed*, 389 U. S. 572 (1968) (per curiam)).

In his concurring opinion, Justice Kennedy likewise was clear that the material question was "how decisions based on an individual student's race are made." 127 S. Ct. at 2792 (Kennedy, J., concurring). "In the administration of public schools by the state and local authorities," Justice Kennedy wrote, "it is permissible to consider the racial makeup of schools and to adopt general policies to encourage a diverse student body, one aspect of which is its racial composition." *Id.* Schools concerned about unequal educational opportunity, he continued, "are free to devise race-conscious measures to address the problem in a general way and without treating each

student in different fashion solely on the basis of a systematic, individual typing by race." *Id.* Permissible measures would include "strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race." *Id.* "These mechanisms are race conscious but do not lead to different treatment based on a classification that tells each student he or she is to be defined by race, so it is unlikely any of them would demand strict scrutiny to be found permissible." *Id.*

Here, in order to avoid potential liability under Title VII for disparate impact, the Civil Service Board acted "in a general way and without treating each [firefighter] in different fashion solely on the basis of a systematic, individual typing by race." *Id.* The decision is akin to rejecting a proposed new school location, when building on the proposed site would worsen, rather than improve, an existing racial disparity within a public school system. This Court has never read either the Equal Protection Clause or Title VII as forbidding state and local governments from making these sorts of commonsense decisions.[3]

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[3] Petitioners cite no authority for their assertion that, under Title VII, making a decision for reasons "related to race" is "direct evidence" of an "impermissible racial motive." Pet. Br. at 48-49. Petitioners can characterize a desire to avoid a disparate impact as "direct evidence" of intentional racial discrimination only because, in their view, such a desire *is* intentional racial discrimination. Petitioners' view, however, makes no sense. Title VII proscribes *both* disparate treatment *and* disparate impact.

Congress surely did not intend that efforts by an employer to avoid liability under one section of the statute would serve as "direct evidence" of liability under another section.

Amici States agree with the position of the United States that strict scrutiny would apply to the Civil Service Board's decision (assuming for purposes of argument that Petitioners had standing to challenge it) only if there were evidence that the reason given by two board members for voting against certification was a pretext for racial discrimination against white candidates. Similarly, Respondents would be liable under Title VII (assuming for purposes of argument that they took an adverse employment action) only if the reason given by the board members was pretextual. Yet the Amici States do not agree with the Solicitor General's suggestion that a remand is required. On summary judgment, Rule 56 required Petitioners to do more than insinuate that some dynamic of "racial politics" caused two board members to vote against certification. *See* Pet. Br. at 31, 61. Because Petitioners presented no evidence that the reason given by the two board members was a pretext, the District Court correctly granted summary judgment for Respondents.

III. STATES REQUIRE FLEXIBILITY IN THE DEVELOPMENT AND ADMINISTRATION OF THEIR PERSONNEL SYSTEMS AND OTHER PROGRAMS.

Permitting an employee to challenge policy decisions that do not materially alter the terms or conditions of his employment would not significantly advance equal opportunity in the workplace. But it would significantly impair the ability of public employers to manage the workplace.

Safeguarding public employers' freedom to cancel actions and "start over" promotes the effectiveness and efficiency of government. *See Waters v. Churchill*, 511 U.S. 661, 674-75 (1994) (plurality opinion) ("Government agencies are charged by law with doing particular tasks. Agencies hire employees to help do those tasks as effectively and efficiently as possible."); *see generally Department of Human Servs. v. May*, 1 P.3d 159 (Colo. 2000) ("[T]he overarching purpose of the state personnel system is 'to assure that a well-qualified work force is serving the residents of Colorado.'"); *Vermont State Employee Ass'n, Inc. v. Vermont Criminal Justice Training Council*, 704 A.2d 769, 773 (1997) ("The historical . . . purpose of the civil service and its merit system principles is to insulate the state work force from political influence so as to improve the effectiveness and efficiency of state government.").

In particular, there are many valid reasons why a government employer may wish to cancel or revise a personnel program or personnel process. Financial considerations may come into play. The employer may need to "eliminate a position instead of promoting an officer into it . . . in order to

redistribute departmental funding." *Jones v. City of Springfield*, 554 F.3d 669, 673 (7th Cir. 2009). Or the employer may decline to make an appointment from an eligibility list due to a "depleted financial situation," *Petru v. City of Berwyn*, 872 F.2d 1359, 1365 (7th Cir. 1989), or fail to create new positions due to a general hiring freeze, *Rogers v. Delaware Dep't of Pub. Safety/DMV*, 541 F. Supp. 2d 623, 628 (D. Del. 2008). *See also, e.g., New York State Law Enforcement Officers, v. New York State Office of Mental Health*, 668 N.Y.S.2d 337 (N.Y. 1998) (upholding decision of correctional psychiatric center not to fill vacant managerial position due to downsizing and layoffs, despite available eligible list).

A "breather" or "do-over" likewise may be advisable in light of external constraints that previously had been overlooked or misunderstood, or that arose during the course of the governmental deliberations. *See Petru*, 872 F.2d at 1365 (standstill agreement with U.S. Department of Justice concerning hiring of firefighters).

A decision to correct error by starting over breaks no new ground in the civil service area. Government agencies have often taken this approach after losing confidence in a civil service selection process. *E.g., In re Police Sergeant (PM3776V) City of Patterson*, 819 A.2d 1173, 1182 (N.J. 2003) (make-up examination voided based on evidence that unknown individuals disseminated exam questions and answers throughout police department); *City of Beaumont v. Spivey*, 1 S.W.3d 385 (Tex. Ct. App. 1999) (appointment of police officer who cheated on civil service examination voided); *Meana v. Morrison*, 329 N.E.2d 535, 540 (Ill. App. Ct. 1975) (examination voided and eligibility list cancelled where some

candidates were permitted to use slide rules and calculators and others were not); *Katz v. Hoberman*, 272 N.E.2d 81 (N.Y. 1971) (promotional exam cancelled after agency used exam questions already made public); *Mangan v. New York State Civil Serv. Comm'n*, 303 N.Y.S.2d 113, 114 (N.Y. 1969) (results of promotional examination cancelled based on unfair advantage from access to re-used exam questions).

There is a need for deliberate action in a case such as this. Notwithstanding government employers' determined efforts to prevent discrimination or other unfairness in hiring and promotion, social scientists have yet to agree upon a fool-proof method of detecting or eliminating all of the racial or cultural bias that may be encoded in a given set of examination questions or procedures. For instance, a recent study found that the results of a standardized test may be affected by the race of the person administering the test. *See* Min-Hsiung Huang, "Race of the Interviewer and the Black-White Test Score Gap," 38:1 *Social Science Research* 29-38 (March 2009). As the district court concluded, "the reasons for testing disparities remain elusive." Pet. App. 34a. Particularly in this uncertain area of government administration, States and other government entities must be allowed the flexibility they need to anticipate and respond to legitimate concerns about the fairness of an ongoing promotion process, *before* concerns about a possible disparate impact become a reality, and thereby become more difficult and costly to remedy.

Imposing liability in cases such as this might drive government decision-making underground. Here, the Civil Service Board, an independent decision-making body, rendered its decision after five

public hearings at which testimony and public comment were taken. Each board member explained his or her vote on the record. The present lawsuit resulted, in large part, from the highly public nature of the board's deliberations and decision. Had the decision to pause and reconsider the promotional examination been made by city personnel administrators, rather than by an independent board, and had the decision been made in private, rather than in public hearings, Petitioners likely would not have brought a lawsuit until some concrete action by the City appeared to foreclose their chance at promotion.

If the Court were to subject government agencies to suit under the circumstances of this case—where no final decision is close to being made, but an intermediate decision was rendered through a highly public process—that outcome would discourage the kind of open process that occurred here. In personnel matters, in procurement, and in the promulgation of regulations, among other areas, government would have a new incentive to make intermediate decisions behind closed doors and to withhold the reasons for those decisions. That would not serve the public interest, nor would it benefit those who do business with the government.

Voluntary compliance is the "preferred means of achieving the objectives of Title VII." *Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 515 (1986). Consistent with this rule, public employers historically have been allowed the flexibility to design personnel programs and make promotional and hiring decisions that *both* achieve equal employment opportunity, *and* further the integrity, efficiency, and transparency of government

operations. Petitioners ask this Court to deny New Haven that needed flexibility and, instead, to intervene in the Civil Service Board's promotional program in a manner that would discourage state and local governments from improving their own administrative processes or, at a minimum, from disclosing the true reasons for improvements. Petitioners' suggested approach would render equal opportunity and good government competing, rather than complementary, objectives. This Court should decline Petitioners' ill-considered invitation.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Second Circuit should be affirmed.

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March 25, 2009

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(4)

No. 08-328

Supreme Court, U.S.
FILED
FEB 26 2009
OFFICE OF THE CLERK

In The
Supreme Court of the United States

FRANK RICCI, *et al.*,

Petitioners,

v.

JOHN DESTEFANO, KAREN DUBOIS-WALTON, THOMAS UDE, JR., TINA BURGETT, BOISE KIMBER, MALCOLM WEBER, ZEMA TIRADO, AND THE CITY OF NEW HAVEN,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONERS, FRANK RICCI, *ET AL.*

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QUESTIONS PRESENTED

This case presents the question whether Title VII and the Equal Protection Clause allow a government employer to reject the results of a civil-service selection process because it does not like the racial distribution of the results. Specifically:

1. When a content-valid civil-service examination and race-neutral selection process yield unintended racially disproportionate results, do a municipality and its officials racially discriminate in violation of the Equal Protection Clause or Title VII when they reject the results and the successful candidates to achieve racial proportionality in candidates selected?

2. Does an employer violate 42 U.S.C. § 2000e-2(l), which makes it unlawful for employers "to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race," when it rejects the results of such tests because of the race of the successful candidates?

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AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONERS, FRANK RICCI, *ET AL.*

Mountain States Legal foundation ("MSLF") respectfully submits this amicus curiae brief on behalf of itself and its members in support of Petitioners, Frank Ricci, *et al.*[1]

INTEREST OF AMICUS CURIAE

Mountain States Legal Foundation ("MSLF") is a nonprofit, public-interest law firm organized under the laws of the State of Colorado with more than 9,000 members. MSLF is dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, the right to own and use property, the free enterprise system, and limited and ethical government. MSLF has been involved particularly in the area of individual liberties and civil rights, having been counsel for plaintiffs in every phase of the proceedings in *Adarand Constructors, Inc.*,[2] *Concrete Works of*

[1] Pursuant to Rule 37.3(a), counsel of record states that the parties have consented to the filing of this brief. Pursuant to Rule 37.6, no counsel for any party authored this brief in whole or in part, and no person or entity, other than the amicus curiae, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

[2] *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

Colorado,[3] *Wygant v. Jackson Board of Education*,[4] and on the petition for certiorari for *Sherbrooke Turf, Inc.*[5] In addition, MSLF has participated in a number of other cases challenging the constitutionality of government-sponsored racial preference programs. MSLF has been dedicated for over twenty-five years to litigating for the equality of all persons, regardless of race, and to applying the same standard of judicial review to all governmental racial classifications – strict scrutiny. MSLF is, therefore, well qualified to comment on the issues now before this Court.

ARGUMENT

I. INTRODUCTION.[6]

The Civil Service Board ("CSB") of New Haven, Connecticut, under pressure from New Haven's Mayor and City Attorney, refused, by a vote of 2-2 with one abstention, to certify the results of a civil service promotional exam. The exam, which is mandated by the City's Charter and is designed to base all

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[3] *Concrete Works of Colorado v. City and County of Denver*, 321 F.3d 950 (10th Cir. 2003).

[4] *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986).

[5] *Sherbrooke Turf, Inc. v. Minnesota Dept. of Transp.*, 541 U.S. 1041 (2004).

[6] Because the Second Circuit affirmed by incorporating the district court's opinion *in toto*, *Ricci v. DeStefano*, 530 F.3d 87 (2d Cir. 2008), citations here will be to the district court opinion.

promotions on qualifications and merit, had been administered to identify candidates for promotion to several open positions for Lieutenant and Captain in the New Haven Fire Department in accordance with the City Charter's "Rule of Three" under which positions are filled from among the three individuals with the highest scores on the exam. The City did not fill the open positions for Lieutenant and Captain because the exam results did not produce the City's desired quotas of minorities to compete for promotion.[7]

The decision to void the test and make no promotions is blatant race-based decision-making, which is designed to achieve racial balance in the fire department. The City desires racially proportional results from the test, not simply equality of opportunity for minority applicants. Such race-based governmental decision-making violates the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.

The City claims there is no violation of the Equal Protection Clause because the test was administered and scored in an identical fashion for all applicants, promoted no one, and thus failed to create a racial classification.[8] But this argument completely ignores the City's racially discriminatory treatment of the

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[7] *Ricci v. DeStefano*, 554 F.Supp.2d 142, 145-151 (D.Conn. 2006).

[8] *Id.* at 161-62.

exam results of those who took and passed it. The decision not to fill the positions because the exams failed to produce a certain racial quota. The Second Circuit below agreed with the City's position.[9] Consequently, neither court engaged in any constitutional scrutiny whatsoever.

Amicus submits that City's decision to disregard the test results and not fill the open positions is a race-based decision designed to achieve racial balancing in the fire department, is subject to strict scrutiny, and violates the Equal Protection Clause of the Fourteenth Amendment.

II. THE DECISION NOT TO FILL THE POSITIONS IS RACE-BASED DECISION-MAKING.

A. Race-Based Decision-Making Is Illegal, Immoral, And Destructive Of Democratic Society.

Equal protection of the laws as embodied in the Constitution is founded on the principle that "distinctions between citizens solely because of their [race or] ancestry are by their vary nature odious to a free people whose institutions are founded upon the doctrine of equality."[10] "'[D]iscrimination on the basis of race is illegal, immoral, unconstitutional, inherently

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[9] *Id.*

[10] *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943).

wrong, and destructive of democratic society.'"[11] Without a doubt, "classifications based on race carry a danger of stigmatic harm."[12] Indeed, "they may in fact promote notions of racial inferiority and lead to a politics of racial hostility."[13] What's more, "there is a danger that racial classification is merely the product of unthinking stereotypes or a form of racial politics."[14] In fact, "r[a]cial classifications . . . seldom provide a relevant basis for disparate treatment" and are "potentially . . . harmful to the entire body politic. . . ."[15] Accordingly, "the moral imperative of racial neutrality is the driving force of the Equal Protection Clause."[16]

Furthermore, these same considerations apply irrespective of which racial group benefits and which is burdened:

> [a]ll governmental action based on race – a *group* classification long recognized as "in most circumstances irrelevant and therefore, prohibited" – should be subjected to detailed judicial inquiry to ensure that the *personal*

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[11] *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 521 (1989) (Scalia, J., concurring) (quoting A. Bickel, *The Morality of Consent* 133 (1975)).

[12] *Croson*, 488 U.S. at 493.

[13] *Id.*

[14] *Id.* at 509.

[15] *Id.* at 505.

[16] *Id.* at 518 (Kennedy, J., concurring).

> right to equal protection of the laws has not been infringed.[17]

Indeed, "under our Constitution, there can be no such thing as either a creditor or a debtor race . . . [a] concept [that] is alien to the Constitution's focus on the individual."[18] Therefore, "[i]n the eyes of government, we are just one race here [–] American."[19] Consequently, there is no "racial paternalism exception to the principal of equal protection."[20] Indeed, "[g]overnment cannot make us equal; it can only recognize, respect, and protect us as equal before the law."[21] Consequently, "there can be no doubt that racial paternalism and its unintended consequences can be as poisonous and pernicious as any other form of discrimination."[22]

B. Race-Based Decision-Making Requires Strict, Skeptical Judicial Scrutiny.

"A racial classification, regardless of purported motivation, is presumptively invalid and may be

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[17] *Adarand Constructors, Inc.* 515 U.S. at 227 (emphasis in original) (quoting *Hirabayashi*, 320 U.S. at 100).

[18] *Id.* at 239 (Scalia, J., concurring).

[19] *Id.*

[20] *Id.* at 240 (Thomas, J., concurring).

[21] *Id.*

[22] *Id.* at 241 (Thomas, J., concurring).

upheld only upon an extraordinary justification."[23] Consequently, race-based decision-making is "subject to the most exacting judicial scrutiny [and] it is the government's burden to satisfy the demands of the extraordinary justification."[24] Therefore, courts must subject any justification for a race-based decision to a "most searching examination" and with "skepticism."[25]

C. Determining Whether A Decision Is Race Based Also Requires Strict, Skeptical Judicial Scrutiny.

It is self evident that determining whether the City's decision is race based or race neutral is critical to applying strict scrutiny to that decision. Because "any preference based on racial or ethnic criteria

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[23] *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 272 (1979). *Accord U.S. v. Virginia*, 518 U.S. 515, 532 (1996).

[24] *Hunter v. Regents of the University of California*, 190 F.3d 1061, 1069 (9th Cir. 1999).

[25] *Adarand*, 515 U.S. at 223, 237. *Accord Wessman v. Gittens*, 160 F.3d 790, 808 (1st Cir. 1998) (the government bears "a heavy burden of justification [for] their use," because "*Croson* . . . leaves no doubt that only solid evidence will justify allowing race-conscious actions."); *Associated General Contractors of Ohio v. Drabik*, 214 F.3d 730, 735 (6th Cir. 2000) ("[T]he state bears the burden of demonstrating a strong basis in evidence for its conclusion that remedial action is necessary."); *Monterey Mechanical Co. v. Wilson*, 125 F.3d 702, 713 (9th Cir. 1997) ("The burden of justifying different treatment by ethnicity or sex is always on the government.")

must necessarily receive a most searching examination,"[26] courts must be no less scrupulous in determining whether raced-based decision-making is behind any particular governmental action. For a court to give strict scrutiny to a race-based governmental decision, it must engage in the same scrutiny to determine whether such a decision is race based, applying the same burden of proof to government. To do less would eviscerate the Equal Protection Clause. History has shown that those who wish to discriminate can be extremely creative, even ingenious, in disguising their racial motives in facially race-neutral facades, the proverbial "wolf in sheep's clothing." [27] A court must be sure that what may appear on its face to be race-neutral is not, in fact, the product of racial politics, whether characterized as "benign" or "discriminatory":

> Absent searching judicial inquiry into the justification . . . there is simply no way of determining what . . . classifications [or decisions] are in fact motivated by . . . simple racial politics. Indeed, the purpose of strict scrutiny is to "smoke out" illegitimate uses of race by assuring that the legislative body is

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[26] *Adarand*, 515 U.S. at 223.

[27] *See, e.g., State of South Carolina v. Katzenbach*, 383 U.S. 301 (1966) (describing the ingenious machinations in certain portion of our country to prevent African-Americans from voting).

pursuing a goal important enough to warrant use of a highly suspect tool.[28]

D. The Decision Not To Fill The Positions Is Race Based.

1. The only reasons the City did not fill the positions is overtly race based.

The City claims that it did not fill the positions because the exam resulted in disparate impact against minority firefighters.[29] That is, not enough minority firefighters passed the exam to qualify them to compete under the "Rule of Three" for promotions. According to the City, this result occurs whenever the exam results do not satisfy the EEOC's "four fifths rule."[30] Under this rule, there is potentially actionable disparate impact when the percentage of minority candidates passing an exam is less then 80 percent of the percentage of the passing rates for non-minority candidates.

Thus, what the City really argues is that whenever the "four fifths rule" is not achieved by passing minorities, the City may, without consequence, throw out the exams and deny opportunity for promotion to all applicants. Under this theory, the City may continue to nullify the exams until such time as the

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[28] *Croson*, 488 U.S. at 493.

[29] *Ricci*, 544 F.Supp. at 162.

[30] *Id.* at 158. This rule is found at 29 C.F.R. § 1607.4(D).

City's racial quotas are achieved in some future exam. This is no more than racial balancing practiced through inaction.

The result of this practice is that non-minority firefighters may not compete on an equal footing for promotion with minority firefighters, who are given innumerable chances to exceed their non-minority counterparts' scores. Thus, the deck is unconstitutionally stacked against the non-minority firefighters. The constitutional injury is not whether an individual was denied promotion, but whether an individual was deprived of the ability to compete on an equal footing for a promotion from the beginning:

> When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing. The "injury in fact" in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit.[31]

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[31] *Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville, Florida*, 508 U.S. 656, 666 (1993); *Adarand*, 515 U.S. at 211 ("Adarand need not demonstrate that it has been, or will be, the low bidder. . . . The injury . . . is that a discriminatory classification prevent[s] the

(Continued on following page)

The decision not to act on the promotions in the fashion here is just as race based as a decision to promote minority firefighters over the non-minorities who had higher scores.

This is illustrated by a hypothetical analogy. Assume that New Haven has a policy that a given percentage of minority contractors should bid on all public construction projects and it has prequalification requirements for all bidders on city construction projects, as do many cities. Prequalification is designed to assure that only contractors who are qualified and able to perform bid the project. Also, assume the City publishes notice for bids and prequalification for the construction of a bridge, and that, after prequalification, the City determines the desired percentage of minority contractors do not qualify to bid. Assume finally that the City thereupon cancels the project so that it may rebid the project at another time, hoping more minority contractors will become prequalified so that they may bid.

No one would credibly argue that this is a race based decision or that non-minority contractors who did prequalify are not at a competitive disadvantage to minority contractors who will have other opportunities to qualify. There can be little doubt that the same is true here, when the City rejected the results of the firefighters' promotional exam.

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plaintiff from competing on an equal footing." (citing *Jacksonville*, 508 U.S. at 667)).

2. The Second Circuit's own findings establish that racial balancing for political reasons was the motivation of the City.

As explained, the Second Circuit summarily found that equal protection jurisprudence did not apply because there was no race-based decision making. This holding, however, contradicts the district court's own findings that race was the predominant motivation to discard the exam results and not promote anyone:

> [The City] acted on the basis of the following concerns:
>
> [1] the test had a statistically *adverse impact on African American and Hispanic examinees;*
>
> [2] promoting off of this list would undermine their *goal of diversity* in the Fire Department and would fail to develop managerial *role models for aspiring [minority] firefighters*;
>
> [3] it would subject the City to *public criticism*; and
>
> [4] would likely subject the City to Title VII lawsuits from minority applicants that *for political reasons* the City did not want to defend.[32]

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[32] *Ricci*, 554 F.Supp.2d at 162 (emphasis added).

The first factor, adverse impact, is based solely on the failure of the test to achieve desired racial balancing, as is achieving work force diversity. Moreover, the desire to create racial role models was emphatically rejected by this Court in *Wygant*.[33] Finally, that the City feared public criticism for promoting too few minority firefighters, irrespective of the reason therefor and did not believe it politically expedient to defend a lawsuit, constitutes the very racial politics so forcefully rejected by *Croson*.[34]

To cap it all off, the Second Circuit found that "[a] jury could infer that the defendants were motivated by a concern that too many whites and not enough minorities would be promoted. . . ."[35] Those courts even concluded that the "City's reasons for advocating non-certification were related to the racial distribution of the results."[36] In spite of these clear findings of racially discriminatory intent, the Second Circuit ignored those findings, and concluded that these considerations do not constitute an "intent to discriminate against non-minority applicants."[37] Indeed,

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[33] *Wygant*, 476 U.S. 267 (termination of non-minority teachers in order to preserve minority role models for minority students constitutionally impermissible).

[34] *Croson*, 488 U.S. at 509.

[35] *Ricci*, 554 F.Supp.2d at 152.

[36] *Id.*

[37] *Id.* at 162.

these courts even stated, "none of defendants' motives could suggest . . . that defendants acted 'because of' animus against non-minority firefighters."[38]

This contradiction can only be explained if the Second Circuit adopted a concept that *Adarand* categorically rejected: only an intent to injure a racial group violates the Equal Protection Clause; discrimination intended to benefit a racial group does not.[39] The Second Circuit is wrong:

> Accepting racial balancing as a compelling state interest would justify the imposition of racial proportionality throughout American society, contrary to our repeated recognition that "[a]t the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class." Allowing racial balancing as a compelling end in itself would "effectively assur[e] that race will always be relevant in American life, and that the 'ultimate goal' of 'eliminating entirely from governmental decision-making

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[38] *Id.*

[39] *Adarand*, 515 U.S. at 227 ("[A]ll racial classifications, imposed by whatever federal, state, or local government actor, must by analyzed by a reviewing court under strict scrutiny.")

such irrelevant factors as a human being's race' will never be achieved."[40]

Thus, the Second Circuit's decision is contrary to long-established precedent of this Court.

III. THE CITY'S RACE-BASED TREATMENT OF THE EXAM RESULTS VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

Governments may justify the use of racially discriminatory preferences only to remedy "extreme" cases of "systematic" patterns of deliberate racial discrimination where such remedies are necessary to "break down patterns of deliberate exclusion."[41] "The only cases found to present the necessary 'compelling interest' sufficient to 'justify a narrowly tailored race-based remedy' are those that expose . . . 'pervasive, systematic, and obstinate discriminatory conduct.'"[42] Even then, racial remedies may be used only as a matter of "last resort,"[43] because such remedies are "the strongest of medicines" "reserved for those severe

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[40] *Parents Involved in Community Schools v. Seattle School District No. 1*, 127 S.Ct. 2738, 2757-58 (2007) (internal citations omitted).

[41] *Croson*, 488 U.S. at 469, 509.

[42] *Associated General Contractors of Ohio*, 214 F.3d at 737 (quoting *Adarand*, 515 U.S. at 237).

[43] *Croson*, 488 U.S. at 519 (Kenney, J., concurring); *Contractor's Association of Eastern Pennsylvania, Inc. v. City of Philadelphia*, 893 F.Supp. 419, 424 (E.D. Pa. 1995), *aff'd*, 91 F.3d 586 (3rd Cir. 1996).

cases that are highly resistant to conventional treatment."[44] Racial preferences are appropriate only as "a remedy for intentional discrimination committed by the public entity according preferential treatment."[45]

The speculation that the City might be sued for disparate impact under Title VII[46] is no more than a "red herring" the City puts forward to justify its race-based decision.[47] There is no law to support the proposition that the City's speculative fear that it might be sued under Title VII disparate impact theories constitutes a compelling interest, justifying racial balancing. A fear of suit under Title VII's disparate impact rules may not serve as a compelling interest for a public employer, because intentional discrimination is not involved. Disparate impact alone, which is the case here, does not provide a public employer with a compelling interest.[48]

Significantly, there is no contention here that the exam was intentionally discriminatory, or that past discrimination by the City had produced the lower test scores. Nor was there any viable contention that the exam was not job-related. In fact, the City paid a

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[44] *Engineering Contractors of South Florida v. Metropolitan Dade County*, 122 F.3d 895, 927 (11th Cir. 1997).

[45] *Builders Association of Greater Chicago v. County of Cook*, 256 F.3d 642, 644 (7th Cir. 2001).

[46] Civil Rights Act of 1964, § 701, 42 U.S.C. § 2000e, *et seq.*

[47] *Ricci*, 554 F.Supp. at 151.

[48] *Washington v. Davis*, 426 U.S. 229 (1976).

great deal of money to an independent firm to develop a job-related, non-biased test.[49] Additionally, the non-minority firefighters argued that the disparate results of the exam were due not to any defects in the exam, but instead to historical political patronage and racial balancing in the City's promotional policies.[50]

CONCLUSION

The City of New Haven engaged in unconstitutional, racially discriminatory treatment of test results, thereby denying non-minority firefighters the opportunity to compete for promotion with minority firefighters on an equal footing. Its decision to scrap the test results is based entirely on the test's failure to produce desired racially balanced results, which would result in political backlash for city officials if they made promotional decisions based on such results. Accordingly, this Court should reverse the decision of the Second Circuit Court of Appeals, declaring that the race-based decisions of the City of New Haven and its Civil Service Board violate the

[49] *Ricci*, 554 F.Supp.2d at 145, 147-48.

[50] *Id.* at 150.

Equal Protection Clause of the Fourteenth Amendment.

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Submitted February 26, 2009

Nos. 07-1428 & 08-328

IN THE

Supreme Court of the United States

FRANK RICCI, *et al.*,

Petitioners,

v.

JOHN DESTEFANO, *et al.*,

Respondents.

On Writs of Certiorari to the
United States Court of Appeals
for the Second Circuit

BRIEF OF AMICUS CURIAE NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC. IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

1. Whether respondents' failure to certify the results of promotional examinations violated the disparate-treatment provision of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a).

2. Whether respondents' failure to certify the results of promotional examinations violated 42 U.S.C. § 2000e-2(*l*), which makes it unlawful for employers "to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race."

3. Whether respondents' failure to certify the results of promotional examinations violated the Equal Protection Clause of the Fourteenth Amendment.

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INTEREST OF AMICUS CURIAE

The NAACP Legal Defense & Educational Fund, Inc., is a non-profit corporation established under the laws of the state of New York to assist African Americans and other people of color in securing their civil and constitutional rights through the prosecution of lawsuits that challenge racial discrimination.[1]

For six decades, LDF has represented parties in litigation before the Supreme Court involving matters of race discrimination in general, and employment discrimination in particular. LDF argued *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), the case in which this Court recognized the disparate impact framework for analyzing employment discrimination claims under Title VII. LDF has also represented parties in other employment discrimination cases before this Court, including *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989); *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984); *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); and *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975).

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[1] This brief is filed with the consent of counsel for both parties. Pursuant to Supreme Court Rule 37.6, counsel for the amicus states that no counsel for a party authored this brief in whole or in part, and that no person other than the amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Employment discrimination has proved more difficult to eliminate in firefighting than in perhaps any other employment sector, public or private. Firefighting is a highly desirable job for many Americans. But fire departments throughout the country, including in New Haven, have historically and notoriously denied employment to African Americans and other people of color. The development of Title VII of the Civil Rights Act of 1964 bears out this reality: The pervasive exclusion of blacks from fire departments nationwide was a central basis for Congress's decision in 1972 to extend that Act to cover state and local government employment.

The 1972 extension of Title VII and this Court's 1971 holding in *Griggs v. Duke Power Co.* have provided critical mechanisms to challenge both intentional discrimination and the use of "artificial, arbitrary, and unnecessary barriers to employment" that operate to exclude African Americans from firefighting. 401 U.S. 424, 431 (1971). Private and federal enforcement efforts have yielded some progress toward greater inclusion of African Americans in fire departments, but racial discrimination and widespread disparities persist. Ongoing efforts by cities like New Haven therefore remain necessary to fully and finally achieve equal employment opportunity for all Americans.

In this case, petitioners seek to establish a rule that avoidance of discrimination against African Americans necessarily amounts to intentional discrimination against whites. Given the persistence of racial discrimination against African Americans in

firefighting, this Court should reject petitioners' attempt to constrain employers' ability "to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975) (quoting *United States v. N.L. Indus., Inc.*, 479 F.2d 354, 379 (8th Cir. 1973)). Petitioners' argument would *require* employers to maintain employment practices that perpetuate discrimination against minorities, and would eviscerate this Court's holding in *Griggs* that employment practices "cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices." 401 U.S. at 430.

ARGUMENT

In 2003, New Haven's fire department administered civil service examinations for promotion to lieutenant and captain. All test-takers were required to meet certain minimum qualifications, including experience in the New Haven Fire Department. Pet. App. 352a, 365a. Based on the exam results, although twenty-seven of the 118 test-takers for both positions were African American, JA225-26, no African Americans would have been eligible to fill any vacancies for lieutenant or captain positions. After considering its obligations under federal anti-discrimination law, New Haven declined to certify the exam results.

In light of the history and persistence of racial discrimination in the New Haven Fire Department, the city's decision here—to forgo making promotions based on a selection device that would produce un-

justified racial disparities in filling traditionally-segregated ranks that continue to exhibit conspicuous imbalances—is entirely permissible under both Title VII and the Equal Protection Clause of the Fourteenth Amendment.

I. Fire Departments Nationwide Have a Long History of Excluding African Americans.

A. Fire Departments Were Foremost Among the Workplaces that Prompted Congress to Extend Title VII to Public Employers in 1972.

There have been few, if any, sectors of public or private employment where racial discrimination has been more firmly entrenched than it has been in firefighting.[2] Widespread racial discrimination in public employment generally—and in fire departments in particular—was a key reason that Congress extended Title VII to state and local government employers in 1972, as the congressional record makes clear. Respondents' efforts more than three decades later to eliminate continuing employment discrimination in filling supervisory positions within New Haven's firefighting force must be viewed in light of this legislative history.

As originally enacted, Title VII exempted state and local employers from coverage. *See* Civil Rights Act of 1964, Pub. L. No. 88-352, § 701(b), 78 Stat. 241, 253 (1964) (defining the term "employer" to ex-

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[2] In addition to African Americans, other minorities and women have long been—and continue to be—excluded from employment as firefighters. *See* Br. of Amici National Partnership for Women & Families, *et al.*; Br. of Amici Asian American Justice Center, *et al.*

clude "a State or political subdivision thereof"). Immediately following the enactment of Title VII, the exclusion of state and local governments from the statute's reach was identified as a serious shortcoming because it permitted the perpetuation of race discrimination in public sector employment. *See, e.g.*, 112 Cong. Rec. 6091-94 (1966) (statement of Sen. Javits); *Equal Employment Opportunities Enforcement Act: Hearings on S. 2453 Before the Subcomm. on Labor of the S. Comm. on Labor and Pub. Welfare*, 91st Cong. 73 (1969) (statement of Jack Greenberg, Director-Counsel, NAACP Legal Defense & Educational Fund, Inc.); *id.* at 167-68 (statement of Howard Glickstein, Staff Director, U.S. Commission on Civil Rights).[3]

In 1972, Congress amended Title VII and redefined "employer" to include state and local govern-

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[3] In addition to extensive testimony at congressional hearings in 1969, Congress heard from numerous witnesses at further hearings in 1971 who stressed the need to extend Title VII to public employers. *See Equal Employment Opportunities Enforcement Act of 1971: Hearings on S. 2515, S. 2617, & H.R. 1746 Before the Subcomm. on Labor of the S. Comm. on Labor and Pub. Welfare*, 92d Cong. 59-61 (1971) (statement of William H. Brown, Chairman, EEOC); *id.* at 197 (statement of Rev. Theodore Hesburgh, Chairman, U.S. Commission on Civil Rights); *id.* at 230 (statement of the AFL-CIO Executive Council); *id.* at 404 (statement of Paul J. Minarchenko, Legislative Rep., AFSCME). In its 1968 report on the underlying causes of recent urban disturbances, the Kerner Commission also recommended extending Title VII. *See Report of the National Advisory Commission on Civil Disorders* 234 (1968) ("Federal, state, and local efforts to [e]nsure equal opportunity in employment should be strengthened by . . . [i]ncluding Federal, state, and local governmental agencies as employers covered by Title VII of the 1964 Civil Rights Act.").

ments, governmental agencies, and political subdivisions. *See* Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2, 86 Stat. 103, 103 (1972) (the "1972 Act"). In enacting the 1972 Act, Congress found that "widespread discrimination against minorities exists in State and local government employment, and . . . the existence of this discrimination is perpetuated by . . . both institutional and overt discriminatory practices." H.R. Rep. No. 92-238 (1971), *reprinted in* 1972 U.S.C.C.A.N. 2137, 2152. Congress further determined that "employment discrimination in State and local governments is more pervasive than in the private sector." *Id.*; *see also* S. Rep. No. 92-415, at 10 (1971), *reprinted in* S. Comm. on Labor and Pub. Welfare, 92d Cong., *Legislative History of the Equal Employment Opportunity Act of 1972*, at 419 (1972).

Congress singled out fire departments in particular as among the most egregious employers that justified the extension of Title VII: "Barriers to equal employment are greater in police and fire departments than in any other area of State and local government. . . . Negroes are not employed in significant numbers in police and fire departments." 118 Cong. Rec. 1817 (1972) (quoting U.S. Comm'n on Civil Rights, *For ALL the people . . . By ALL the people: A Report on Equal Opportunity in State and Local Government Employment* 119 (1969) [hereinafter 1969 USCCR Report]).[4]

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[4] Throughout the congressional debates, Congress relied heavily upon the 1969 USCCR Report, which detailed pervasive discrimination against African Americans in public sector employment generally and in firefighting in particular. Senator Williams, the principal Senate sponsor of the 1972 Act, in-

Of particular relevance to this case, Congress found that "fire departments have discouraged minority persons from joining their ranks by failure to recruit effectively and by permitting unequal treatment on the job including unequal promotional opportunities, discriminatory job assignments, and harassment by fellow workers." *Id.* Congress also cited specific barriers to fair employment in fire departments that included the denial of promotional opportunities because of "rel[iance] on criteria unrelated to job performance and on discriminatory supervisory ratings," as well as the use of "selection devices which are arbitrary, unrelated to job performance, and result in unequal treatment of minorities." *Id.* Congress further found that discrimination was especially acute at the supervisory level: "Negro . . . firemen hold almost no positions in the officer ranks." *Id.*

Congress was especially concerned that continued employment discrimination in firefighting and other highly visible jobs impaired government performance and democratic accountability: "The problem of employment discrimination is particularly acute and has the most deleterious effect in these governmental activities which are most visible to the minority communities . . . with the result that the credibility of the government's claim to represent all the people

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troduced excerpts of the 1969 USCCR Report into the Congressional Record. 118 Cong. Rec. 1815 (1972) (statement of Sen. Williams); *id.* at 1816-19; *see also Connecticut v. Teal*, 457 U.S. 440, 449-50 n.10 (1982) (noting Congress's reliance on the 1969 USCCR Report in extending Title VII to state and local employers).

equally is negated." H.R. Rep. No. 92-238, 1972 U.S.C.C.A.N. at 2153.

B. Congress Legislated Against a Backdrop of Widespread Segregation and Discrimination in Firefighting.

When Congress extended Title VII to state and local governments in 1972, racial discrimination was widespread in fire departments nationwide.

1. Many fire departments refused to hire African Americans before the late 1950s or 1960s, and those that were willing to hire African Americans only did so in rare instances, assigned them to segregated firehouses, and subjected them to severe harassment. For example, the Memphis fire department hired its first black employees in 1955, but did not integrate any fire stations until 1966. *See* 1969 USCCR Report 71. The city of Atlanta first hired black firefighters in 1961, and maintained segregated firehouses at least through 1969.[5] *See id.* at 71, 89. Other fire departments resisted integration long after this Court's decision in *Brown v. Board of*

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[5] Other fire departments were even slower to hire blacks. Birmingham did not hire its first black firefighter until 1968. *See* H.R. Rep. No. 102-40(I), at 52 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 590 (House Report on the Civil Rights Act of 1991) ("Birmingham's history of . . . segregation and discrimination against blacks is well known. Because of such discrimination Birmingham did not hire its first black police officer until 1966, its first black firefighter until 1968, [and] its second black firefighter until 1974." (alterations in original) (quoting testimony of Richard Arrington, Mayor of Birmingham)). Dallas did not hire its first black firefighter until 1969. *See City of Dallas v. Dallas Fire Fighters Ass'n*, 526 U.S. 1046, 1046 (1999) (Breyer, J., dissenting from denial of certiorari).

Education, 347 U.S. 483 (1954), outlawed segregation in public education. *See, e.g., Hammon v. Barry*, 813 F.2d 412, 434 (D.C. Cir. 1987) (Mikva, J., dissenting) (Washington, D.C. maintained all-white and all-black fire companies until 1962); *McNamara v. City of Chicago*, 959 F. Supp. 870, 874 (N.D. Ill. 1997) (Chicago maintained segregated firefighting companies until 1965), *aff'd*, 138 F.3d 1219 (7th Cir. 1998); *Harper v. Mayor of Baltimore*, 359 F. Supp. 1187, 1195 n.11 (D. Md.) ("Segregation persisted in the Baltimore Fire Department for more than a decade after [*Brown*]."), *aff'd in relevant part sub nom. Harper v. Kloster*, 486 F.2d 1134 (4th Cir. 1973); 1969 USCCR Report 71 (Baton Rouge maintained segregated fire stations at least through 1969).

Even after many fire departments were officially desegregated, black firefighters were routinely barred from using the same shared living and sleeping quarters as whites. For example, after Washington, D.C. firehouses were desegregated in the 1960s, black firefighters were required for more than a decade to sleep in designated "C" beds and eat from separate "C" dishes and "C" utensils, for "Colored." *Hammon*, 813 F.2d at 434; *see also Firefighters Inst. for Racial Equal. v. City of St. Louis*, 549 F.2d 506, 514-15 (8th Cir. 1977) (describing all-white "supper clubs" that persisted in the St. Louis fire department through the late 1970s and required blacks to "cook[] and eat[] apart from their white associates"); 1969 USCCR Report 71, 89 (finding that the only black firefighter employed in San Francisco in 1967 was required to carry his own mattress between stations during his training period); Robert J. Crawford Sr. with Delores A. Crawford, *Black Fire: Portrait of a*

Black Memphis Firefighter 64, 69 (2007) [hereinafter *Black Fire*] (black firefighters in Memphis slept in designated "Jim Crow" beds through the late 1960s). Nor did formal integration end racial hostility and discrimination, such as the assignment of blacks to the most dangerous positions on the job. *See* John C. McWilliams, *"Men of Colour": Race, Riots, and Black Firefighters' Struggle for Equality from the AFA to the Valiants*, 41 J. Soc. Hist. 105, 114 (Fall 2007).[6]

Those fire departments that did not entirely exclude black firefighters frequently manipulated hiring procedures to screen out black applicants. For instance, in the same year that the Memphis fire department eliminated its ban on hiring of African Americans, it also instituted—for the first time in its history—a high school diploma requirement, and then applied this requirement selectively to black candidates for more than two decades. *See Black Fire* 52, 105; *see also* David A. Goldberg, Courage Under Fire: African American Firefighters and the Struggle for Racial Equality 125-29, 254, 288 (Feb. 2006) (unpublished Ph.D. dissertation, University of Massachusetts Amherst) (describing changes in hiring procedures in New York City, Los Angeles, and Baltimore during the 1950s and 1960s that had the effect of restricting African American hiring).

In 1973, the National Commission on Fire Prevention and Control found widespread use of hiring practices unrelated to successful performance as a firefighter, with the result that "[r]acial minorities

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[6] As discussed in Part II.B.2, *infra*, segregation and harassment of African American firefighters are by no means historical practices only.

are under-represented in the fire departments in nearly every community in which they live." Nat'l Comm'n on Fire Prevention & Control, *America Burning* 5, 35-37 (1973); *see also* Bill Kovach, *Race Discrimination Found in U.S. Fire Departments*, N.Y. Times, June 5, 1973, at 30 (quoting a staff member of the National Commission stating that "our fire departments are correctly called the last white man's country club").

Hiring barriers were paired with widespread refusal to recruit black candidates. *See* 1969 USCCR Report 87 ("[F]ire departments have not usually tried to recruit minority group members no matter how poorly they may have been represented in the department."). Given the historical exclusion of blacks from firefighting jobs, reliance on word-of-mouth recruiting and nepotism also led to disproportionately low numbers of black applicants. *See, e.g.*, *Dozier v. Chupka*, 395 F. Supp. 836, 841, 849 (S.D. Ohio 1975) (holding that informal recruitment methods perpetuated racial discrimination because "whites only drew more whites to a predominantly white force").

2. The exclusion of African Americans from meaningful participation in firefighting jobs was also perpetuated through discriminatory promotional practices. White supervisors often used discriminatory ratings and assignments to keep black firefighters from advancing. *See, e.g.*, *Firefighters Inst. for Racial Equal. v. City of St. Louis*, 588 F.2d 235, 241-42 (8th Cir. 1978) (holding that the St. Louis fire department's practice of disproportionately assigning temporary supervisory positions to whites deprived black firefighters of opportunities for supervisory

experience); *McNamara*, 959 F. Supp. at 875; *Black Fire* 79; 1969 USCCR Report 86. Black firefighters were also denied the training and mentoring that white firefighters received. *See McNamara*, 959 F. Supp. at 874-75; *Harper*, 359 F. Supp. at 1194 & n.7 (describing Baltimore firefighter's testimony that promotion exam materials were made "freely available to whites" in the firehouse but not shown to him); *see also Black Fire* 47-50, 52; Carol Chetkovich, *Real Heat: Gender and Race in the Urban Fire Service* 84-85, 116-17 (1997). Some fire departments adopted formal or informal quotas that prevented qualified blacks from being promoted. *McNamara*, 959 F. Supp. at 875 (finding that in Chicago, until the late 1970s, "a black would not be promoted to these upper ranks unless another black vacated the position").

As a result, black firefighters have typically been promoted at a much slower rate than white firefighters. *See id.*, 959 F. Supp. at 875 (reviewing promotional statistics in Chicago from 1973 to 1993 and finding that "[t]he length of time it has taken for blacks to be promoted from firefighter to lieutenant has been significantly longer than that for whites"); *Black Fire* 52.

3. Because firefighters are required to share living space while on the job, firefighting has been particularly resistant to racial integration. The pattern of exclusion, segregation, and discrimination described above has been reinforced and perpetuated by this particular feature of the job. *See* 1969 USCCR Report 87 ("[T]he unusual working arrangement of firemen has given rise to many forms of prejudiced attitudes and treatment.").

Firefighters are typically assigned to work twenty-four-hour shifts, and live, eat, and work at their fire station while on duty. *See Mems v. City of St. Paul, Dep't of Fire & Safety Servs.*, 327 F.3d 771, 775 (8th Cir. 2003); Denise M. Hulett *et al.*, *Enhancing Women's Inclusion in Firefighting in the USA*, 8 Int'l J. of Diversity in Organisations, Communities & Nations 189, 190 (2008) [hereinafter *Enhancing Inclusion*]. While these facets of firefighting—combined with its prestige, good pay, job security, and valuable societal contribution—have made it a desirable job for many Americans, they have also created an organizational culture that has been particularly resistant to integration. As the U.S. Commission on Civil Rights found, "[b]ecause firemen live together, fire department integration involves a greater degree of intimacy . . . [and has] been more vigorously resisted." 1969 USCCR Report 88.

This distinctive firefighting culture is a primary reason that fire departments resisted efforts to eliminate discrimination longer and more vigorously than perhaps any other employer, with the result that, as discussed in Part II, *infra*, discrimination persists today despite nearly four decades of enforcement efforts.

II. Egregious Discrimination Persists in Fire Departments Nationwide, Despite Efforts to Enforce Title VII's Mandate.

As noted, the 1972 Act extended Title VII's reach to state and local government employers. One year earlier, this Court held that Title VII permitted employees to challenge not only overt discrimination but also job-selection procedures "that operate as

'built-in headwinds' for minority groups and are unrelated to measuring job capability." *Griggs*, 401 U.S. at 432. In the nearly four decades since *Griggs* and the 1972 Act, Title VII enforcement has yielded partial, uneven results. While employment practices in many fire departments have improved since the 1970s, discrimination and racial disparities persist, both in New Haven and throughout the country.

A. New Haven Has Yet to Eliminate the Effects of Entrenched Racially Discriminatory Practices in Its Fire Department.

Petitioners contend that "New Haven and its officials have a documented history of violating Connecticut law to give minorities advantageous treatment in public employment." Pet. Br. 29; *see also id.* at 5-6. This assertion is false. As respondents themselves acknowledge, "the City Fire Department's litigation history demonstrates discrimination against African-Americans, not whites." Resp't Br. 38-39.[7] And the historical and present record make clear that although New Haven has made some progress

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[7] Petitioners cite four recent cases in support of their claim that New Haven "stood accused in multiple suits of repeatedly and intentionally discriminating against whites." Pet. Br. 5. But each cited case deals with a dispute over the interpretation of various civil service rules, and not one includes a finding that New Haven currently—or ever—discriminated against white employees. *See Kelly v. City of New Haven*, 881 A.2d 978, 981-82, 986, 1000-01 (Conn. 2005); *Hurley v. City of New Haven*, No. 054009317, 2006 WL 1609974, at *1-*5 (Conn. Super. Ct. May 23, 2006); *Henry v. Civil Serv. Comm'n*, No. 411287, 2001 WL 862658, at *1, *3 (Conn. Super. Ct. July 3, 2001); *Bombalicki v. Pastore*, No. 378772, 2001 WL 267617, at *1, *9-*10 (Conn. Super. Ct. Feb. 28, 2001), *aff'd*, 804 A.2d 856 (Conn. App. Ct. 2002); *see also* Resp't Br. 4-5, 38-39 & n.34.

toward inclusion of blacks, principally in entry-level firefighting positions, it has never eradicated racial discrimination from its firefighting workforce.

1. When the New Haven fire department first became subject to Title VII in 1972, it mirrored the historical nationwide pattern of black exclusion from firefighting. As of the following year, the department had barely opened its ranks to minority firefighters: only 18 of 502 firefighters (3.6%) were black and none was Hispanic, though New Haven's population was 30% black and Hispanic at the time. *See Firebird Soc'y of New Haven, Inc. v. New Haven Bd. of Fire Comm'rs*, 66 F.R.D. 457, 460 (D. Conn.), *aff'd mem.*, 515 F.2d 504 (2d Cir. 1975). The exclusion of black firefighters was even more pronounced at the supervisory level: "of the 107 officers in the Department only one was black, and he held the lowest rank above private." *Id.*

In 1973, the Firebird Society—an organization of black firefighters in the New Haven fire department—sued the department to challenge "a pattern of willful discrimination" in hiring and promotions. *Id.* at 459-60. The lawsuit challenged "almost all aspects of the hiring and promotional practices" of the fire department, and alleged that New Haven's entry exam, minimum requirements, promotional exam, time-in-grade requirements, and the use of supervisory recommendations in promotions were all discriminatory devices. *Id.* The suit ended in a consent decree requiring the department to increase minority recruiting, develop job-related entrance and promotional exams, and modify other promotional practices to diminish the adverse impact of those practices on black firefighters. *Id.* at 461-63.

In 1989, the Firebird Society again filed suit to challenge discrimination against black and Hispanic firefighters in promotions. *See New Haven Firebird Soc'y v. Bd. of Fire Comm'rs*, 593 A.2d 1383, 1384 (Conn. 1991). A Connecticut appellate court upheld a trial court finding that the department's long-standing practice of disproportionately promoting white individuals to positions that were not yet vacant, just prior to the expiration of a promotion eligibility list, violated civil service laws. *See New Haven Firebird Soc'y v. Bd. of Fire Comm'rs*, 630 A.2d 131, 134-35 (Conn. App. Ct. 1993).

In 1998, black firefighters sued New Haven to challenge the practice of using lower-ranked officers to fill positions budgeted for a higher rank. *See Broadnax v. City of New Haven*, 851 A.2d 1113, 1118 & n.2 (Conn. 2004). This practice, known as "underfilling," introduced a larger number of white lieutenants into the candidate pool for captain exams, and resulted in blacks receiving fewer promotions. *Id.* at 1122, 1130, 1138. In 2004, the Connecticut Supreme Court affirmed the trial court's ruling that the practice violated civil service laws, and reversed the trial court's dismissal of the plaintiffs' claim of intentional discrimination against black firefighters. *Id.* at 1131-36, 1138-39. Two of the plaintiffs, John Brantley and Christopher Texeira, won sizeable jury verdicts and awards of front pay and back pay based on those claims of race discrimination. *See Broadnax v. City of New Haven*, No. CV980412193S, 2008 WL 590818, at *1-*2 (Conn. Super. Ct. Feb. 19, 2008); *Broadnax v. City of New Haven*, No. CV980412193S, 2007 WL 155138, at *1 (Conn. Super. Ct. Jan. 2, 2007).

2. Despite these repeated and successful lawsuits challenging discrimination against black employees, New Haven has made limited progress in promoting minority firefighters. Severe shortfalls persist in the number of African Americans among the officer ranks—the very positions at issue in this litigation.

For example, in 1973, there were no African Americans among the thirty-four captains in the department. *Firebird Soc'y*, 66 F.R.D. at 460. More than three decades later, the department's improvement is marginal: in 2005, just one out of twenty-one captains was black. JA217. Within the officer ranks as a whole, minorities are similarly under-represented. Of thirty-two officers at the level of captain or higher, there were just three African Americans and three Hispanics in 2005. JA218.

This significant shortfall is not due to a shortage of black entry-level firefighters, where—in contrast to the supervisory ranks—New Haven has made some progress in hiring people of color. According to New Haven's most recent EEO-4 data,[8] in 2007, African Americans held 32% of entry-level positions in the fire department, but only 15% of supervisory positions. *See* City of New Haven, State and Local Government Information Report EEO-4 (2007).

This substantial disparity between minority representation in entry-level and supervisory positions suggests the presence of systematic barriers to ad-

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[8] An EEO-4 Report is a report that state and local governments with over one hundred employees are required to submit biennially to the EEOC, recording the number of employees by race, sex, and job function (including fire protection). *See* 29 C.F.R. §§ 1602.30, 1602.32.

vancement for minorities, because the skills needed to perform effectively as a supervisor are generally those learned through observation and performance on the job as an entry-level firefighter. *See In re Birmingham Reverse Discrimination Employment Litig.*, 20 F.3d 1525, 1537-38 & n.18 (11th Cir. 1994) ("Training and experience as a firefighter are special skills required of those who would become fire lieutenants. As such, to determine if an imbalance existed . . . the appropriate comparison is between black representation in the . . . lieutenant ranks and black representation among entry-level firefighters.").[9] This disparity also highlights the distance New Haven has yet to travel in redressing the concerns that originally motivated the extension of Title VII through the 1972 Act. *See* 118 Cong. Rec. 1817 (1972) (finding that "[p]romotional opportunities are not made available to minorities on an equal basis. . . . Negro . . . firemen hold almost no positions in the officer ranks.").

B. Nationally, Overt Discrimination and Racial Disparities Persist in Firefighter Employment.

The experience of black firefighters in New Haven reflects the experiences of black firefighters around the country. Although Title VII enforcement

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[9] *See also Stuart v. Roache*, 951 F.2d 446, 450-52 (1st Cir. 1991); *Horan v. City of Chicago*, No. 98-C-2850, 2003 WL 22284090, at *53 (N.D. Ill. Sept. 30, 2003) ("The work of a firefighter, an engineer, a lieutenant, a captain, and a battalion chief is largely learned through observation and on-the-job training. . . . The evidence at trial established that on average, whites, African-Americans, and Latinos have performed equally well in each of these positions.").

efforts have yielded some progress, it has been fitful and incomplete.

1. Shortly after Congress passed the 1972 Act, private litigants as well as the United States Department of Justice, through its Civil Rights Division, began challenging discrimination by fire departments against minorities and women. *See* U.S. Comm'n on Civil Rights, *To Eliminate Employment Discrimination, A Sequel: The Federal Civil Rights Enforcement Effort—1977*, at 270 (1977). These enforcement actions resulted in judicial findings of unlawful discrimination against African Americans by fire departments in all regions of the country, including Cleveland, Birmingham, St. Louis, New York City, Newark, Bridgeport, Buffalo, Philadelphia, Massachusetts (state-wide), San Francisco, Baltimore, and Minneapolis.[10]

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[10] *See Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 506 (1986) (citing *Headen v. City of Cleveland*, No. C73-330 (N.D. Ohio Apr. 25, 1975)) (Cleveland); *Ensley Branch, NAACP v. Seibels*, 616 F.2d 812, 814, 816-22 (5th Cir. 1980) (Birmingham); *Firefighters Inst.*, 549 F.2d at 509-15 (St. Louis); *Vulcan Soc'y of N.Y. City Fire Dep't, Inc. v. Civil Serv. Comm'n*, 490 F.2d 387, 391-98 (2d Cir. 1973) (New York City); *United States v. New Jersey*, 530 F. Supp. 328, 334-38 (D.N.J. 1981) (Newark); *Ass'n Against Discrimination in Employment, Inc. v. City of Bridgeport*, 479 F. Supp. 101, 104-11 (D. Conn. 1979) (Bridgeport), *aff'd in relevant part*, 647 F.2d 256 (2d Cir. 1981); *United States v. Buffalo*, 457 F. Supp. 612, 621-23, 627-29, 639 (W.D.N.Y. 1978) (Buffalo), *aff'd in relevant part*, 633 F.2d 643 (2d Cir. 1980) (per curiam); *Pennsylvania v. Rizzo*, 13 Fair Empl. Prac. Cas. (BNA) 1475, 1480 (E.D. Pa. 1975) (Philadelphia); *Boston Chapter, NAACP v. Beecher*, 371 F. Supp. 507, 513-17 (D. Mass.) (Massachusetts state-wide), *aff'd*, 504 F.2d 1017 (1st Cir. 1974); *W. Addition Cmty. Org. v. Alioto*, 369 F. Supp. 77, 79 (N.D. Cal. 1973) (San Francisco);

Other fire department lawsuits were resolved through settlement agreements negotiated after employers were confronted with compelling evidence of segregation of black employees, deliberate exclusion of blacks from the workforce, and gross racial disparities caused by non-job-related selection devices. *See, e.g.*, *Vulcan Pioneers, Inc. v. N.J. Dep't of Civil Serv.*, 832 F.2d 811, 813 (3d Cir. 1987) (covering twelve fire departments in New Jersey); *United States v. City of Alexandria*, 614 F.2d 1358, 1365-66 & n.14 (5th Cir. 1980) (approving a consent decree in light of egregious racial disparities in forty-five local fire and police departments in Louisiana), *abrogated on other grounds as recognized in Dean v. City of Shreveport*, 438 F.3d 448, 452 n.1 (5th Cir. 2006); *Vulcan Soc'y of Westchester County, Inc. v. Fire Dep't*, Nos. 78 Civ. 0911, 80 Civ. 0336, 1996 WL 481066, at *1 (S.D.N.Y. Aug. 23, 1996) (describing 1981 consent decrees covering four fire departments in Westchester County, New York); *Alexander v. Bahou*, 86 F.R.D. 194, 196, 198-204 (N.D.N.Y. 1980) (entering consent decree covering Syracuse fire and police departments).

In many cases, however, consent decrees proved insufficient to root out persistent discrimination. For instance, the Third Circuit in 1983 described "the tenacious grasp of discrimination" in the Wilmington, Delaware fire department, notwithstanding a prior consent decree. *See Wilmore v. City of Wilmington*, 699 F.2d 667, 668, 675 (3d Cir. 1983)

Harper, 359 F. Supp. at 1194-1212 (Baltimore); *Carter v. Gallagher*, 3 Fair Empl. Prac. Cas. (BNA) 692, 693, 695-700, 708 (D. Minn. 1971) (Minneapolis), *aff'd in relevant part*, 452 F.2d 315 (8th Cir. 1972) (en banc).

(noting that minorities made up 48% of Wilmington's labor force but only 15% of the firefighter force and 4% of the officer ranks, and explaining that important training opportunities were assigned exclusively to whites because of the "personal preferences" of superior officers).

2. As a result of these private and federal enforcement efforts, there has been some progress, if uneven, in firefighter employment, but discrimination and racial disparities persist.

Explicit, intentional discrimination endures. As late as 2004, most black firefighters in Cleveland were assigned to station houses within one battalion that was "pejoratively labeled 'Monkey Island.'" *Jordan v. City of Cleveland*, 464 F.3d 584, 589 & n.6, 597 (6th Cir. 2006) (noting also that one predominantly white firehouse featured "a 'Wall of Hate,' a partition erected by white firefighters with derogatory comments directed toward black firefighters . . . [that] remained in place until 1999"). These are not isolated incidents. Minority firefighters nationwide continue to experience disparate treatment: According to a recent survey, 44.7% of firefighters of color reported that they have been treated differently because of their race during their careers. *See Enhancing Inclusion* 195.

Disparities in hiring and promotions also persist. Census data reveal significant under-representation of African Americans and other minorities in fire departments at the national and local levels. A recent study of 2000 census data concluded that nationwide, racial and ethnic minorities accounted for 16.7% of the firefighter workforce, compared to

30.1% of benchmark occupation[11] *Id.* at 193. Accordingly, persons of color were employed at just over half of their expected rate compared to benchmark jobs. *Id.*

Recent findings of liability for Title VII disparate impact discrimination against black firefighters bear out these national figures. Entrance examinations continue to produce gross and unjustified disparate impact in firefighter hiring, even in municipalities that have long been subject to enforcement efforts aimed at opening the firefighter ranks. For example, the state of Massachusetts was recently found to have violated Title VII by using state-wide firefighter hiring exams in both 2002 and 2004 that had an unjustified adverse impact on minority candidates. *See Bradley v. City of Lynn*, 443 F. Supp. 2d 145, 167-75 (D. Mass. 2006). The district court concluded that the multiple-choice exams in question were not job-related because they did not test for important skills that were predictive of an applicant's future success on the job. *See id.* at 172-73. The state's continuing discriminatory testing practices occurred notwithstanding enforcement efforts begun over thirty years ago to eradicate hiring discrimination in firefighter jobs throughout Massachusetts. *See Boston Chapter, NAACP v. Beecher*, 504 F.2d 1017, 1018, 1026-28 (1st Cir. 1974); *see also Bradley*, 443 F. Supp. 2d at 150-51, 175-76 (describing the *Beecher* litigation and noting that "[t]hirty

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[11] The study defined benchmark occupations to include 184 jobs that share with firefighting the characteristics of being "demanding, dirty, or dangerous." *Enhancing Inclusion* 193.

years later, not much has changed").[12]

Fire departments have also been subject to recent enforcement action for imposing hiring standards that disproportionately screen out black candidates and bear no relationship to the job of firefighting. The Department of Justice entered into a settlement agreement last month with the city of Dayton, Ohio, where the past twenty-five years have seen a dramatic decline in African Americans in the city's fire department, from 7.0% in 1984 to 2.4% in 2008. *See* Proposed Consent Decree, *United States v. City of Dayton*, No. 3:08-cv-348 (S.D. Ohio Feb. 26, 2009); Complaint ¶¶ 6, 8, *United States v. City of Dayton*, No. 3:08-cv-348 (S.D. Ohio Sept. 26, 2008) (blacks make up only 2.4% of firefighters compared to 36.8% of the city's civilian labor force). The settlement requires the city to eliminate a certification requirement it imposed on entry-level applicants that disproportionately screened out black candidates. *See* Proposed Consent Decree ¶¶ 9-11, *United States v. City of Dayton*.

Towns in the New Haven metropolitan area also continue to have egregious problems in firefighter hiring. East Haven, which is adjacent to New Haven, has been particularly slow to hire black employ-

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[12] Other jurisdictions have recently been found to discriminate against black applicants in firefighter hiring as well. *See, e.g., Lewis v. City of Chicago*, No. 98-C-5596, 2005 WL 693618, at *8-*15 (N.D. Ill. Mar. 22, 2005) (holding that Chicago discriminated against black applicants in firefighter hiring between 1996 and 2001 by using exam results that had an unjustified racially disparate impact), *rev'd on other grounds*, 528 F.3d 488 (7th Cir. 2008), *petition for cert. filed*, 77 U.S.L.W. 3449 (U.S. Jan. 21, 2009) (No. 08-974).

ees—as of 1996, East Haven had never hired a single black police or fire department employee. *See NAACP v. Town of E. Haven*, 998 F. Supp. 176, 178, 185-88 (D. Conn. 1998) (ruling that East Haven must alter its recruitment efforts to overcome the "perception in the black community that the Town is closed to black employment, unwelcomingly hostile, and resistant"); *see also* Mark Zaretsky, *6 Years After Suit, NAACP Says East Haven Should Try Harder*, New Haven Reg., Mar. 1, 2004 (noting that by 2004, East Haven had three black volunteer firefighters but not a single paid minority firefighter).

In addition to these recent findings and settlements, there are numerous disparate impact lawsuits pending around the country that challenge unjustified racial disparities in black firefighter employment. For example, a pending lawsuit in New York City challenges disparate impact in two firefighter hiring exams and notes that New York City's fire department is currently made up of only 3% black firefighters, in a city that is nearly 27% black[13]—evidencing only marginal progress in the decades since 1973, when the Second Circuit held that the New York fire department's selection procedures impermissibly discriminated against black and Hispanic applicants. *See* Complaint ¶¶ 1, 6, *United States v. City of New York*, No. 07-cv-2067 (E.D.N.Y. May 21, 2007); Plaintiff-Intervenors' Complaint ¶¶ 1-2, 30-31, *United States v. City of New York*, No. 07-cv-2067 (E.D.N.Y. Sept. 25, 2007); *Vulcan Soc'y of*

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[13] *See* U.S. Census Bureau, State & County QuickFacts, New York (city), New York, http://quickfacts.census.gov/qfd/states/36/3651000.html.

N.Y. City Fire Dep't, Inc. v. Civil Serv. Comm'n, 490 F.2d 387, 391-98 (2d Cir. 1973).[14]

The volume and nature of this ongoing litigation make clear the continuing extent of racial discrimination in firefighting jobs not only in New Haven but throughout the country.

III. The History and Persistence of Racial Discrimination in Firefighting Should Inform the Court's Resolution of This Case.

The persistence of discrimination in firefighting provides justification for a municipal employer to suspend promotions based on a selection device with significant racial disparities, especially where, as here, the employer reasonably believed that the testing procedures were flawed and that less discriminatory alternatives were available.

A. Title VII Does Not Prohibit Employers from Declining to Use Selection Procedures that May Perpetuate Racial Disparities in Traditionally Segregated Job Categories.

Past and present context is critically relevant in assessing both New Haven's effort to comply with Title VII and petitioners' challenge to New Haven's actions.

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[14] *See also Coffey v. Braddy*, No. 3:71-cv-44, 2009 WL 591280, at *3 (M.D. Fla. Mar. 6, 2009) (reopening lawsuit challenging discrimination against black applicants in Jacksonville, Florida firefighter hiring); *Bazile v. City of Houston*, No. H-08-2404, 2008 WL 4899635, at *2-*6 (S.D. Tex. Nov. 12, 2008) (denying motion to dismiss black firefighters' Title VII claims regarding promotional exams).

In justifying its decision to reject racially disparate results from an employee selection practice, an employer need not *prove* that use of the practice would violate Title VII or even amount to an "arguable violation." *Johnson v. Transp. Agency, Santa Clara County*, 480 U.S. 616, 630 (1987) (quoting *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 212 (1979)). Rather, an employer "need point only to a 'conspicuous . . . imbalance in traditionally segregated job categories,'" and demonstrate that its actions to address that imbalance do not "unnecessarily trammel" the interests of any adversely affected employees. *Id.* at 630 (quoting *Weber*, 443 U.S. at 208-09).

Petitioners argue that respondents' decision to suspend the 2003 promotions was motivated by illegal discrimination against white firefighters. Pet. Br. 18-20, 23-27, 45-47. But in light of the record in this case and New Haven's ongoing efforts to overcome the legacy of discrimination in its fire department, petitioners cannot meet their burden to show a dispute of material fact to support their allegation that New Haven's non-discriminatory rationale—compliance with Title VII—is a pretext for unlawful discrimination. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506-08 (1993); *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253-55 (1981).

Respondents easily satisfy the standard set forth in *Johnson* and *Weber*. As described in Part II.A, *supra*, there is presently a conspicuous imbalance within New Haven's firefighter ranks, especially within the lieutenant and captain positions that are at issue in this case. Petitioners themselves concede that if minority firefighters had challenged the pro-

motional exams at issue here, the test results would have constituted prima facie evidence of a disparate impact violation, *see* Pet. Br. 50-51, a showing that this Court has held is far more than sufficient to meet the conspicuous imbalance requirement. *Johnson*, 480 U.S. at 632-33 & n.10.

In addition, the historical record makes clear that firefighting—both in New Haven and throughout the country—is a "traditionally segregated job category." *Id.* at 632. Indeed, New Haven has a long history of discrimination against African Americans in its firefighting force, and especially in the supervisory ranks. *See* Part II.A, *supra*.

Finally, New Haven's actions did not unnecessarily trammel petitioners' interests. New Haven did not create an "absolute bar" to petitioners' advancement, and did not impose any racial quotas. *Johnson*, 480 U.S. at 637-39. New Haven simply decided not to certify the racially-disparate results of promotional tests, having determined that there would be equally effective ways to select candidates for promotional positions with less adverse impact.[15] *See* 29

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[15] There have been some instances where efforts to redress discrimination against minorities in firefighting have been successfully challenged by white employees. *See, e.g., Dean*, 438 F.3d at 452-53, 462-63 (holding that part of the city of Shreveport's firefighter hiring process, adopted to comply with a 1980 consent decree, violated Title VII by establishing different cut-off scores—and therefore different hiring lists—by race); *Biondo v. City of Chicago*, 382 F.3d 680, 682-85 (7th Cir. 2004) (holding that Chicago violated Title VII and the Equal Protection Clause by creating separate promotions lists by race and then promoting from each list in strict proportion to the racial make-up of all test-takers). However, respondents' actions here did not involve anything like the quotas or other aggressive

C.F.R. §§ 1607.3, 1607.4(C)(1) (EEOC Uniform Guidelines on Employee Selection Procedures). All of the petitioners retained their current jobs and have not even alleged that they will be unable to compete with all other eligible firefighters when new promotional exams are developed and implemented. *See Johnson*, 480 U.S. at 638.

As the United States explains in its amicus brief, petitioners cannot show that New Haven's non-discriminatory reason is pretextual unless petitioners can demonstrate that the city's concerns about Title VII compliance were "unreasonable." Br. of United States 17. Petitioners fail to meet that burden. The reasonableness of New Haven's actions is amply supported by the gross racial disparity in the test results, *see* Resp't Br. 27-28, the substantial doubts regarding the tests' job-relatedness that emerged during the Civil Service Board hearings, *see* Resp't Br. 28-32, and the evidence of less discriminatory alternatives, *see* Resp't Br. 32-35.[16]

The history and persistence of discrimination in New Haven's fire department further undercut any

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remedial plans that have been successfully challenged by white firefighters in the past; rather, the city's efforts represented a modest attempt to ensure compliance with the core principles of Title VII. *See* Resp't Br. 5-10.

[16] The amicus brief of well-reputed industrial psychologists makes clear that New Haven's promotional tests fell well short of the standard set by other fire departments around the country in developing selection processes that are better able to identify candidates with the knowledge, skills, abilities, and other personal characteristics needed to perform successfully as fire lieutenants and captains. *See* Br. of Amici Industrial-Organizational Psychologists.

contention that the city's stated motives were pretextual. Given New Haven's uneven and incomplete efforts to eliminate the longstanding barriers to promotion of minority firefighters, it is surely reasonable for the Civil Service Board to engage in a transparent review process when faced with promotional tests that produce unexpectedly large racial disparities. "[V]oluntary employer action can play a crucial role in . . . eliminating the effects of discrimination in the workplace, and . . . Title VII should not be read to thwart such efforts." *Johnson*, 480 U.S. at 630.

B. Employer Efforts to Ensure Fair Selection Procedures Do Not Trigger Strict Scrutiny.

Petitioners' contention that constitutional strict scrutiny should be triggered by New Haven's actions, Pet. Br. 21-27, is fundamentally an attack on Title VII's disparate impact standard as articulated by this Court in *Griggs* and codified by Congress in the Civil Rights Act of 1991. See *Griggs*, 401 U.S. at 429-30, 436; 42 U.S.C. § 2000e-2(k)(1)(A). As detailed above, since the extension of Title VII to states and localities, the disparate impact standard has played a key role in enforcement actions to root out pervasive discrimination in firefighting by dismantling tests that are unrelated to job performance.[17]

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[17] In fact, in codifying the disparate impact standard in the Civil Rights Act of 1991, Congress again relied specifically on evidence of discrimination in firefighting and recognized the importance of the disparate impact standard in challenging ongoing discrimination in firefighter employment. *See* H.R. Rep. No. 102-40(I), at 99-100 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 637-38.

This Court recognized in *Griggs* that Title VII reflected Congress's intent to impose upon employers an affirmative obligation "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." 401 U.S. at 429-30. This obligation is especially important where, as here, racial discrimination has endured in a particular workforce. *See Weber*, 443 U.S. at 197-99, 203-04 ("[T]he crux of the problem [addressed by Title VII was] to open employment opportunities to Negroes in occupations which have been traditionally closed to them." (quoting 110 Cong. Rec. 6548 (1964) (remarks of Sen. Humphrey))).

Petitioners do not suggest that there was a need for heightened constitutional review of New Haven's efforts to design promotional tests that complied with Title VII. *See* Pet. Br. 6-10, 41; *cf. Hayden v. County of Nassau*, 180 F.3d 42, 46 (2d Cir. 1999). The level of constitutional scrutiny should not be increased simply because New Haven determined—after its new promotional tests yielded even greater racial disparities than prior tests, *see* Resp't Br. 6—that additional steps were necessary to avoid perpetuating discrimination in the fire department's racially-stratified promotional ranks. The City's additional steps here (including the decision to investigate further, the identification of possible flaws in the test design, the consideration of less discriminatory alternatives, and the conclusion that the test results should not be certified) did not involve the allocation of specific positions to particular individuals or any other "dispositions based on race." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 239

(1995) (Scalia, J., concurring). Even assuming that compliance with a civil rights statute is a race-conscious measure, strict scrutiny does not apply to such "race-conscious measures to address [a] problem in a general way." *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2792-93 (2007) (Kennedy, J., concurring in part and concurring in the judgment).

C. If Strict Scrutiny Applies, Title VII Compliance is a Compelling Interest in Light of the History and Persistence of Discrimination in Firefighting.

If strict scrutiny applies, this Court should find that New Haven had a compelling interest in complying with Title VII. As an initial matter, notwithstanding petitioners' suggestion to the contrary, Pet. Br. 28-33, none of this Court's precedents in any way suggest that a public employer does not have a compelling interest in avoiding a violation of Title VII's disparate impact proscription. As demonstrated in Part I.A, *supra*, when Congress decided in 1972 to extend Title VII to state and local employers, it had before it a record filled with evidence of egregious racial discrimination by public employers generally and fire departments in particular.

The central dispute with respect to petitioners' constitutional claim focuses on the amount of evidence that New Haven was required to present to show a "strong basis in evidence" that its actions were necessary to advance a compelling interest. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989) (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986) (plurality opinion)). Under

this Court's precedents, it is clear that the requisite showing is something less than proof of prior discrimination. *Id.*; *see also Wygant*, 476 U.S. at 277-78 (plurality opinion); *id.* at 290-92 (O'Connor, J., concurring). In *Croson*, this Court indicated that the "strong basis" requirement is satisfied by evidence "approaching a prima facie case of a constitutional or statutory violation." *Croson*, 488 U.S. at 500. On the facts of this case, the Court need not resolve whether, as *Croson* suggests, something *less than* a prima facie case may suffice, because petitioners acknowledge that the evidence of adverse impact in the promotional tests at issue would suffice to establish a Title VII prima facie case. Pet. Br. 50-51.

The rationale behind and historical development of the Title VII disparate impact framework compel the conclusion that the "strong basis" test is satisfied by a prima facie showing of disparate impact.[18] One of the primary purposes of the disparate impact standard is to screen out subtle or surreptitious intentional discrimination. *See In re Employment Discrimination Litig. Against Ala.*, 198 F.3d 1305, 1322

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[18] Applying *Croson*'s standard, a number of federal courts have held that the demonstration of a prima facie case of Title VII disparate impact is sufficient to satisfy the "strong basis in evidence" requirement. *See Donaghy v. City of Omaha*, 933 F.2d 1448, 1458-60 (8th Cir. 1991); *Davis v. City of San Francisco*, 890 F.2d 1438, 1442-44, 1446-47 (9th Cir. 1989); *Howard v. McLucas*, 871 F.2d 1000, 1007-08 (11th Cir. 1989) (citing *Howard v. McLucas*, 671 F. Supp. 756, 760-61 (M.D. Ga. 1987)); *United States v. New Jersey*, 75 Fair Empl. Prac. Cas. (BNA) 1602, 1611, 1614-15 (D.N.J. 1995); *Paganucci v. City of New York*, 785 F. Supp. 467, 477 (S.D.N.Y. 1992), *aff'd*, 993 F.2d 310, 312 (2d Cir. 1993) (adopting the district court's reasoning).

(11th Cir. 1999). As Eleventh Circuit Judge Tjoflat has noted:

> [A] *prima facie* finding of disparate impact by the court means that the plaintiff has demonstrated that the challenged practice (and not something else) actually *causes* the discriminatory impact at issue. Though the plaintiff is never explicitly required to demonstrate discriminatory motive, a genuine finding of disparate impact can be highly probative of the employer's motive since a racial "imbalance is often a telltale sign of purposeful discrimination."

Id. at 1321 (quoting *Int'l Bhd. of Teamsters v. United States,* 431 U.S. 324, 339-40 n.20 (1977)). In other words, the Title VII disparate impact framework provides a powerful evidentiary tool in cases where discrimination may otherwise be difficult to prove; it proceeds by countering ordinary explanations other than discriminatory intent for an employment policy or practice with a demonstrably adverse impact.

Equally important, the disparate impact framework is also intended to eliminate employment practices that may be neutral on their face but nevertheless perpetuate racial disparities without business justification, thereby "freezing" in place the status quo created by prior racial discrimination. *Griggs*, 401 U.S. at 430; *see also Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 987 (1988) ("[T]he necessary premise of the disparate impact approach is that some employment practices, adopted without a deliberately discriminatory motive, may in operation

be functionally equivalent to intentional discrimination.").

Accordingly, a prima facie case of disparate impact is tantamount to evidence of either surreptitious intentional discrimination or self-perpetuating racial hierarchy in the workplace. Prohibiting public employers from taking remedial action in such contexts—especially in a job category like firefighting that is characterized by both past and present discrimination—would severely undermine Title VII's goal of encouraging voluntary compliance. *See Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 545 (1999) ("Dissuading employers from implementing programs or policies to prevent discrimination in the workplace is directly contrary to the purposes underlying Title VII."). Voluntary compliance is particularly essential because Title VII "aims, chiefly, 'not to provide redress but to avoid harm.'" *Id.* at 545 (quoting *Faragher v. City of Boca Raton*, 524 U.S. 775, 806 (1998)).

New Haven should not be penalized for heeding Congress's clear directive that employers "self-examine" their employment practices and voluntarily cease those practices that perpetuate discrimination. *Albemarle*, 422 U.S. at 417-18.

CONCLUSION

For the foregoing reasons, as well as those outlined by respondents, the decision below should be affirmed.

Respectfully submitted,

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MARCH 25, 2009

Nos. 07-1428, 08-328

In the

Supreme Court of the United States

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Plaintiffs-Appellants,

v.

JOHN DESTAFANO, KAREN DUBOIS-WALTON, THOMAS UDE JR., TINA BURGETT, BOISE KIMBER, MALCOM WEBER, ZELMA TIRADO AND CITY OF NEW HAVEN,

Defendants-Appellees.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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February 26, 2009

QUESTIONS PRESENTED

1. Can a court exonerate a local government's concededly race-based decision to decline to certify civil service exam results without subjecting the decision to strict scrutiny?

2. Can a local government's conceded racial balancing survive strict scrutiny where its only claimed justifications are its three-fold desire to avoid (i) public criticism, (ii) Title VI lawsuits brought by minorities, and (iii) a lack of *statistical* racial diversity?

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INTEREST OF *AMICI CURIAE*[1]

The National Association of Police Organizations, Inc. (NAPO) is a coalition of police unions and associations from across the United States that serves to advance the interests of America's law enforcement officers through legislative and legal advocacy, political action, and education. Founded in 1978, NAPO is now the strongest unified voice supporting law enforcement officers in the United States. NAPO represents more than 2,000 police unions and associations, 241,000 sworn law enforcement officers, 11,000 retired officers and more than 100,000 citizens who share a common dedication to fair and effective crime control and law enforcement.

NAPO's interests in this case are straightforward. Like the firefighter plaintiffs here, many members of NAPO work for government entities that utilize civil service testing in order to determine which law enforcement officers will be promoted, or be deemed eligible for promotion. NAPO's members, and members of organizations that NAPO represents, invest countless hours of study as well as personal funds in order to prepare for civil service exams. How they fare on those exams impacts their careers, the well-being of their families, and their personal pride. NAPO is therefore deeply interested in the

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[1] Petitioners and respondents have consented to the filing of this brief in letters on file in the Clerk's office. Pursuant to S. Ct. R. 37.6, NAPO states that no counsel for a party authored this brief in whole or in part, and that no counsel or party made a monetary contribution intended to fund the preparation or submission of the brief.

fair and lawful treatment of exam results by government entities.

In NAPO's view, to be both fair and lawful, civil service exam results must be handled free from the taint of racial politics. All too often, the process of law enforcement and the satisfaction felt by its participants are undermined by the injection of race-based decisionmaking like that which the lower court conceded was present in this case. This will not do. NAPO submits this brief of *amicus curiae* to explain why the Equal Protection Clause bars a municipality from punishing successful civil service exam test-takers on the basis of their skin color, and why to hold otherwise would do damage to law enforcement organizations across the country.

INTRODUCTION AND SUMMARY OF ARGUMENT

Among the clearest of rules emerging from the last three decades of this Court's Equal Protection jurisprudence is that, without exception, "all governmental uses of race are subject to strict scrutiny." *See Grutter v. Bollinger*, 539 U.S. 306, 326-27 (2003). Once a court determines that racial considerations have entered into government's decisionmaking, there is no room for dawdling. The court must place the decision under a microscope, determine if its justification is compelling and its fit is narrow, and, except in rare circumstances, condemn the decision to eternity.

The governmental decision at issue here presents a textbook case of race-based decisionmaking. The lower court squarely found that the Civil Service Board's refusal to certify the exam results was motivated by the race of those who performed best. *See, e.g., Ricci v. DeStefano*, 554 F.Supp.2d 142, 158 (D.Conn. 2006) ("the evidence shows that race was taken into account in the decision not to certify the test results."). Accordingly, "a most searching examination" calling for "the most exact connection between justification and classification" was required. *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003) (citation omitted).

The lower court, however, did not apply strict scrutiny. It engaged instead in a roving exploration, unbound by any identified level of review, seeking reasons why the Board's concededly race-based decision was somehow not discriminatory. In the lower court's view, the Board's racially-motivated acts were not discriminatory because: (i) after

dumping the results of the race-neutral exams in the trash (because white applicants did too well), *all* test-takers – regardless of race – had to retake the exams (the "Square One" theory); (ii) the successful white applicants lost only an opportunity to be promoted, not a promotion itself (the "No Blood, No Foul" theory); and (iii) the Board did not display racial hatred or "animus" toward those it disadvantaged; instead, it simply wanted to promote a different mix of skin colors (the "Benign Motives" theory). As may well be obvious, the Court has never held that any of these factors immunizes a race-based decision from strict scrutiny; its decisions instead hold to the contrary.

The failure to subject the Board's decision to strict scrutiny by itself constitutes reversible error. But the lower court's decision should also be reversed because a straightforward application of strict scrutiny shows the Board's decision cannot endure. This Court's decisions foreclose the argument that intentional discrimination can be justified by a desire to avoid an unintentional racial imbalance in a public employment roster. Purposeful discrimination is a problem, not a solution.

That problem does not disappear just because the Board believed that a federal law compelled its actions. *No federal law requires discrimination.* The federal law to which the defendants pledge allegiance, Title VII, imposes a general rule of *non-discrimination*. In any event, regardless of what Title VII requires, that statute cannot trump a public employer's obligations under the Equal Protection Clause. Nor does a tacked-on diversity rationale help. The word "diversity" is not a secret password that, once intoned, entitles a public employer to play

a straight numbers game, the type of which this Court has consistently rejected.

Finally, it is worth considering the impact of the racial politicking that inspired the Board's decision on our nation's public safety and law enforcement officials. The firefighters taking these tests are not doing so in their capacity as whites, or as blacks, or as members of any racial group. They are taking these tests as individual public servants trying to make a better life for themselves and the members of their communities. It is government that comes in later, introduces division into unity, and, in the case of New Haven, compounds that division by declaring winners and losers based on race.

New Haven is hardly alone among municipalities caving in to pressure groups when making public safety policy and promotion decisions. Given the unfortunate impact such decisions have on morale, cohesion, recruitment, and retention, the Court should hold such decisions to the same standard it holds other race-based decisions, strict scrutiny. Under that standard, fears of lawsuits and of bad press, and misguided views of a law's requirements, cannot justify the racial coding, balancing, and punishment like that found below.

ARGUMENT

I. The Lower Court Erred By Drawing A Non-Existent Distinction Between The Board's Race-Based Decisionmaking And Condemnable Discrimination.

This Court's decisions establish that race-based decisionmaking of every stripe is inherently suspect and unwaveringly subject to strict scrutiny. *See Grutter*, 539 U.S. at 326-327 ("all governmental uses of race are subject to strict scrutiny"). The Court has consistently rejected pleas to lower the standard where the impacted individuals are white, *see Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 222 (1995) ("the Fourteenth Amendment requires strict scrutiny of all race-based action by state and local governments"); where race is said to have been used for "remedial" or "benign" reasons, *see Johnson v. California*, 543 U.S. 499, 505 (2005) ("We have insisted on strict scrutiny in every context, even for so-called 'benign' racial classifications"); and even where the race-based decision was unambiguously made to comply with existing federal law. *See Adarand*, 515 U.S. at 208 (construction contract requiring unlawful set-aside drafted in compliance with federal Transportation statute). Plainly put, "race-based government decisionmaking is categorically prohibited unless narrowly tailored to serve a compelling interest." *Parents Involved in Cmty Sch. v. Seattle Sch. Dist. No. 1*, 127 S.Ct. 2738, 2770 (Thomas, J., concurring) (citing *Grutter*, 539 U.S. at 326).

Whether the Board engaged in race-based decisionmaking is *not* in dispute here. The lower court found as a matter of fact that it did: "Plaintiffs'

evidence – and defendants' own arguments – show that the City's reasons for advocating non-certification were related to the racial distribution of the results." *Ricci*, 554 F.Supp.2d at 152. This was no slip of the tongue or sloppy draftsmanship. As the court continued, a "jury could infer that the defendants were motivated by a concern that too many whites and not enough minorities would be promoted were the lists to be certified." *Id.* Any such inference by the jury would be well-founded indeed; after all, "the *evidence* shows that race was taken into account in the decision not to certify the test results." *Id.* at 158 (emphasis added).

Taking no heed of the Court's precedents, the lower court declined to subject this *concededly* race-based decision to strict scrutiny. In doing so, the court did not claim the favor of any contrary decision in the Court's canon; it did not cite to decisions of this Court at all. It engaged instead in continued exploration to determine what *effect* the Board's racially-inspired acts had on various racial groups, analyzing whether the acts drew "racial classifications" and inflicted "disparate treatment" on one class or another. *Ricci*, 554 F.Supp.2d at 161. Finding no disadvantaged *class*, it found no discrimination, purposeful or otherwise, and thus no need for heightened scrutiny. *Id.*

To describe the lower court's methodology is to condemn it. The first step of a court's Equal Protection analysis – identifying whether the government act should be subjected to strict scrutiny *ends* when the court finds *any* use of race by government. *See Grutter*, 539 U.S. at 326-327 ("all governmental uses of race are subject to strict scrutiny"); *Adarand*, 515 U.S. at 222 ("the

Fourteenth Amendment requires strict scrutiny of all race-based action by state and local governments"); *Parents Involved*, 127 S. Ct. at 2751 ("when the government distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny."). No further inquiry into the *nature* of the decision is warranted before triggering strict scrutiny of the government's reasons; if the act is race-based, it must be justified under a single uniform standard. *See Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 291 (1978) (opinion of Powell, J.) ("[r]acial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination.").

There was, therefore, no warrant for the lower court's roving exploration for "racial classifications" and "disparate treatment" among groups. Nor was there any need. What the facts of this case show is that race-based decisions *invariably* draw classes and dispense disparate treatment. Here, the Board took race "into account" in examining its certification decision; became "concern[ed] that too many whites and not enough minorities would be promoted;" and declined to certify given the "racial distribution of the results." *Id.* at 152, 158. What did the Board do *besides* divvy the applicants by race and dispense favor to the "class" it preferred?

Rather than move forward with the next logical stage of the inquiry – strict scrutiny – the lower court engaged in a hair-splitting exercise aimed at distinguishing between the Board's race-based decision on the one hand, and discrimination worthy of scrutiny under the Equal Protection Clause on the other. In doing so, the lower court deferred to the

Board's *justifications* for its decision, without subjecting the Board to any burden of proof. This methodology was wrong on several levels.

First, justifications for race-based decisionmaking, by definition, are reserved for strict scrutiny; they cannot immunize decisions from that inquiry. As the Court has explained, "[p]olitical judgments regarding the necessity for the particular classification may be weighed in the constitutional balance ..., but the standard of justification will remain constant." *Adarand*, 515 U.S. at 228 (citation omitted). *Second*, deference to those justifications, at any stage of the inquiry, is inappropriate. *See id.* at 501 ("blind judicial deference to legislative or executive pronouncements of necessity has no place in equal protection analysis"). *Third*, the burden is always on the race-based decision maker, not its victim, to justify its actions. *See Parents Involved*, 127 S.Ct. at 2766 (courts are to place "the burden on state actors to demonstrate that their race-based policies are justified" under strict scrutiny) (quoting *Johnson*, 543 U.S. at 506, n. 1).

Setting aside the wrong level of scrutiny, the wrong amount of deference, and the wrong placement of the burden of proof, the lower court's conclusions that the Board's race-based decision was non-discriminatory was faulty. The court formulated three theories for claiming otherwise. None find support in this Court's decisions; instead, this Court's decisions reject them all.

- **<u>The "Square One" Theory.</u>**

The lower court observed that "all applicants took the same test, and the result was the same for all because the test results were discarded and nobody

was promoted." *Ricci*, 554 F. Supp. at 161. In effect, the court suggested that since the Board's race-based decision returned *all* applicants to "square one," the Board conferred no advantage on any "class" of competitors. Acceptance of this theory, however, requires the suspension of reality and a vision of "group rights" this Court has long rejected.

As the court recognized, forty-one applicants took the Captain's exam, and the top nine scorers were white or Hispanic (seven white, two Hispanic). *Id.* at 145. Based on New Haven's "Rule of Three," which mandates that a civil service position be filled from among the three individuals who score best on the exam, the nine top scorers formed the eligible pool for filling the seven vacant Captain slots. *See id.* As for the Lieutenant's exam, seventy-seven applicants took the test, and the top ten scorers, to fill eight vacancies, were white. Had the Board certified the results, therefore, no black applicants would have been promoted.

Accordingly, the Board's refusal to certify the scores was no harmless act. Returning *all* test-takers to square one, including the top scorers eligible for promotion (who are known and identifiable people), resulted in the highest scorers losing their opportunity to fill the vacant slots. Worse, fifteen individuals (seven would-be Captains and eight would-be Lieutenants) appear to have lost more than an opportunity for promotion. They lost the promotions themselves.

It is from those *individuals'* perspective that discrimination must be analyzed. Whatever merit there may be to the district court's position that both white and black "classes" of applicants were returned

to the starting gate, this Court has long held that equal protection rights are "guaranteed to the *individual*," and the "rights established are *personal* rights." *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948) (emphasis added). Regardless of the "class" to which he or she belongs, a citizen's "'personal rights" must "be treated with equal dignity." *City of Richmond v. J.A. Croson*, 488 U.S. 469, 493 (1989); *Miller v. Johnson*, 515 U.S. 900, 911 (1995) ("[a]t the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial ... class.") (internal citations and quotation marks omitted). Thus, when the Board acted from its concern that "too many whites ... would be promoted were the lists to be certified" it discriminated against those "whites" that passed the exam but were ordered returned to square one. *Ricci*, 554 F.Supp.2d at 152.[2]

- **The "No Blood, No Foul" Theory.**

The lower court suggested that "performing well on the exam does not create an entitlement to promotion," implying that a race-based decision must strip its victim of an "entitlement" in order to be discriminatory. *Id.* at 161. While it is true that

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[2] *J.E.B. v. Alabama*, 511 U.S. 127, 140 (1994) is on point. Employing a lower level of scrutiny, the Court held that gender-based preemptory challenges "cause[] harm" to "the *individual* jurors who are wrong-fully excluded from participation in the judicial process." *Id.* (emphasis added). It did so regardless of the fact that, as the dissent contended, "all *groups* are subject to the peremptory challenge" making it "hard to see how any *group* is denied equal protection." *Id.* at 159 (Scalia, J., dissenting) (emphasis added).

some bodies of law require an entitlement or vested right before a claim may go forward – the law of takings and of retroactivity come to mind – Equal Protection is not so stringent: "[t]he 'injury in fact' in an equal protection case ... is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit," or, as in this case, "the inability to compete on an equal footing in the bidding process, not the loss of contract." *Northeastern Fla. Chapter, Associated Gen. Contractors of Am. v. Jacksonville*, 508 U.S. 656, 666 (1993).

The lower court's vested rights theory has been repeatedly tested – and roundly rejected – by this Court. Thus, the Court did not require that Adarand Constructors show it would have been "the low bidder on a Government contract" before subjecting the minority set-aside there to strict scrutiny. *Adarand*, 515 U.S. at 211. It did not require the *Gratz* plaintiff to show he "'actually applied' for admission as a transfer student" before subjecting Michigan's racial scoring system to strict scrutiny. *Gratz*, 539 U.S. at 260-61. And it did not require each of the *Parents Involved* plaintiffs to prove their children would necessarily "be denied admission to a school based on their race" before submitting Seattle's program to strict scrutiny. *Parents Involved*, 127 S. Ct. at 2751. As the Chief Justice explained there, "one form of injury under the Equal Protection Clause is being forced to compete in a race-based system that may prejudice the plaintiff." *Id.* (citing cases).

New Haven imposed a race-based system that prejudiced the plaintiffs. Whether it was justified in doing so is reserved for the strict scrutiny inquiry. It

suffices to say here that while the lower court's "no-blood, no foul" theory may find support in playground games of pick-up basketball, it has no support in Equal Protection. In that body of law, the mere placement of a discriminatory "thumb on the scale" will do. *See Hill v. Ross*, 183 F.3d 586, 588 (7th Cir. 1999) (Easterbrook, J.) (explaining that *Adarand* held that "race may not be employed as a thumb on the scale" in doling out government favor).

- **The "Benign Motives" Theory**.

The lower court also refused to apply strict scrutiny because "[n]othing in the record in this case suggests that the [defendants] acted 'because of discriminatory animus toward plaintiffs,'" appearing to require that a race-based decision be driven by bad motives before it can be labeled discriminatory. *Ricci*, 554 F.Supp.2d at 161. The court's theory undermines a generation of cases that subject any and all motives underlying race-based decisionmaking – good, bad, and ugly – to strict scrutiny. Moreover, the court failed to recognize that, even if so-called "benign" motives compelled the decision, such motives do not automatically save the decision from condemnation.

As the Court has explained, "[a]bsent searching judicial inquiry into the justification for ... race-based measures, there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics." *Croson*, 488 U.S. at 493. The Court has "insisted on strict scrutiny in every context, even for so-called 'benign' racial classifications." *Johnson*, 543 U.S. at 505.

Thus, the lower court's contention that "*plaintiffs* cannot show that defendant's acted out of an intentionally discriminatory purpose," *Ricci*, 554 F.Supp.2d at 161, was not only (i) premature (as rendered outside the strict scrutiny analysis), and (ii) wrongly focused on plaintiff's proof, *see Parents Involved*, 127 S.Ct. at 2766 (placing burden of proof on defendants), but it was also utterly besides the point. *Parents Involved*, 127 S.Ct. at 2774 (Thomas, J., concurring) ("benign race-based decisionmaking suffers the same constitutional infirmity as invidious race-based decisionmaking").

Finally, it bears emphasis that, even were "benign" motives justification for declining to employ strict scrutiny, it is highly questionable that the rule fashioned by the lower court would apply here. *See Adarand*, 515 U.S. at 226 ("'it may not always be clear that a so-called preference is in fact benign'") (citation omitted). As the lower court noted, a "jury could infer that the defendants were motivated by a concern that too many whites and not enough minorities would be promoted were the lists to be certified." *Ricci*, 554 F.Supp.2d at 152. The interest to be served, therefore, was the interest in preventing white test-takers from obtaining the promotions they had earned *because they were white*. This is not a benign interest. This is the *antithesis* of a benign interest. *See* A. Bickel, The Morality of Consent 133 (1975) ("The lesson of the great decisions of the Supreme Court and the lesson of contemporary history have been the same for at least a generation: discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society.").

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Because all race-based decisionmaking by government is subject to strict scrutiny, and because the lower court failed to subject concededly race-based decisionmaking to strict scrutiny, the decision should be reversed.

II. The Board's Actions Cannot Withstand Strict Scrutiny.

The fact that the race-based decionmaking at issue here involved outright racial balancing is beyond dispute. After the Board looked at the exam results it decided to start the process anew because "too many whites" passed and too many blacks failed. It was a numbers game pure and simple. Whether this "racial balancing" was made for the odious and inherently suspect reason of avoiding "political backlash" or for more benign purposes matters not. "[O]utright racial balancing" under the Equal Protection Clause is "patently unconstitutional." *See Grutter*, 539 U.S. at 330.

"At the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as *individuals*, not simply as *components* of racial, religious, sexual or national class." *Parents Involved*, 127 S.Ct. at 2738 (citations omitted). And because "*all* government action based on race" necessarily involve "*group* classifications," they must all be "subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed." *Grutter*, 539 U.S. at 326.

Because the Equal Protection Clause stands as a bulwark against all forms of state-sponsored racial discrimination, *see Washington v. Davis*, 426 U.S. 229, 239 (1976), it makes no difference whether the

State's actions are malevolent or benevolent. Simple "assurances of good intentions cannot suffice," *Croson*, 488 U.S. at 500, rather, to pass muster, the government must prove that its racial discriminations are "narrowly tailored measures that further compelling governmental interests." *Adarand*, 515 U.S. at 227.

Here, the Board offered three reasons for its race-based decision to discard the exam results. *First*, it professed a desire to avoid the "public criticism" stemming from the promotion of white applicants. *Ricci*, 554 F.Supp.2d at 162. *Second*, it wanted to avoid potential "Title VII lawsuits from minority applicants that, for political reasons, [it] did not want to defend." *Id.* *Third*, it claimed a desire to promote statistical "diversity" within the fire department. *Id.*[3]

The insufficiency of these justifications become clear when viewed through the lens of this Court's prior cases. Because "distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality," to date, this Court has only "recognized two interests that qualify as compelling." *See Parents Involved*, 127 S.Ct. at 2752, 2767. "The first is the compelling interest of remedying the effects of *past intentional* discrimination." *Id.* at 2752. "The second ... is the

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[3] These interests are treated separately from those identified in the prior section. Section I addressed the theories advanced by the *court* for declining to use strict scrutiny. Section II addresses the interests advanced by the *Board* that purport to satisfy strict scrutiny.

interest in diversity," which to date has only been deemed compelling in the limited and unique context of "higher education." *Id.* at 2753.

But even these two interests are narrow in scope. States may not use racially discriminatory measures to remedy "societal discrimination," that is, "discrimination not traceable to its *own* actions." *Id.* at 2758 (*quoting Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 288 (1985) (O'Connor, J., concurring)). Likewise, "[r]acial balancing is not transformed from 'patently unconstitutional' to a compelling state interest simply by relabeling it 'racial diversity.'" *Parents Involved*, 127 S.Ct. 2738. Instead, whether diversity is compelling depends on "context" and on whether the race of the participants is considered as only one component in the program in which diversity is sought. *Grutter*, 539 U.S. at 327, 337.[4]

There is, therefore, no argument that the government here is pressing an interest previously recognized by the Court as compelling. The only question is whether the interests the government does put forth are worthy of that company.

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[4] Although this case can be decided on narrower grounds, some members of this Court have suggested that the scope of compelling government interests is even narrower. Justice Scalia has argued that the "government can never have a 'compelling interest' in discriminating on the basis of race in order to 'make up' for past racial discrimination in the opposite direction," since "under our Constitution there can be no such thing as a creditor or debtor race." *See Adarand*, 515 U.S. at 239 (Scalia, J., concurring). Similarly, Justice Thomas has argued that "only those measures the State must take to provide a bulwark against anarchy, or to prevent violence, will constitute a pressing public necessity." *Grutter*, 539 U.S. at 353 (Thomas, J., concurring in part, dissenting in part).

- **The Public Criticism Justification.**

The Board's first reason for scrapping the exam results was the city's desire to avoid "public criticism." *Ricci*, 554 F.Supp.2d at 162. Certainly no case has ever suggested that a state official may trample upon an individual's unalienable right – that "all [people] are created equal" – simply because the official fears that his name will appear in the newspapers. Interests such as these are advanced by hiring better public relations personnel, not by discrimination. As this Court has recognized, every race-based government decision reflects the view that "a politically acceptable burden" can be "imposed on particular citizens on the basis of race." *Parents Involved*, 127 S.Ct. at 2765. If that view alone were sufficient to justify state-sponsored discrimination, nothing would be left of the Equal Protection clause.

- **Compliance With Title VII Justification.**

The Board's second justification is perhaps more worthy of discussion, but no more meritorious. The Board argues that certifying the exam results *might* "subject the City to Title VII lawsuits from minorities that, for *political reasons*, [it] did not want to defend." *Ricci*, 554 F.Supp.2d at 162 (emphasis added).

Merely because the Board finds it more politically palatable to defend *this* discrimination suit, rather than discrimination suits brought by minorities, is hardly compelling. At worst, the desire to avoid minority litigation by promoting more minorities is "discrimination for its own sake, forbidden by the Constitution." *See Croson*, 488 U.S. at 496. At best,

that desire reflects an effort to take the path of least resistance, avoiding the trouble and expense of litigation by a potentially larger group of individuals. That is not sufficient. *Id.* at 508 ("the interest in avoiding bureaucratic effort" is not a compelling government interest," and "'administrative convenience' is not a shibboleth, the mere recitation of which dictates constitutionality.").

We acknowledge, however, that – despite what the lower court found – it may not be the fear of *lawsuits* that drove the Board to discriminate, but the fear of *liability*. There is no question that, as a public employer, the City must tread carefully. On the one hand, it must attempt to "eliminate every vestige of racial segregation and discrimination;" on the other, it must "do away with all governmentally imposed discriminations based on race." *Wygant*, 476 U.S. at 277 (citation omitted). But the fact that these "two interrelated constitutional duties ... are not always harmonious" does not give a public employer *carte blanche* to discriminate in favor of one race and against another. *Id.*

Rather, a public employer must act "with extraordinary care" and be prepared to convince a "trial court" that its chosen course of action was "necessary" to accomplish its "constitutional duties." *Id.* As this Court has explained, until a judicial determination of unlawful discrimination has been made, "an appellate court reviewing a challenge by nonminority employees ... cannot determine whether the race-based action is justified." *Id.* at 278.

No such judicial determination has been made here. The Board never claimed that its actions were compelled by the Equal Protection Clause. Nor could

it. At its outer limits, the Equal Protection Clause permits race-based decision-making to remedy "past intentional discrimination." *See Parents Involved*, 127 S.Ct. 2752. But the record is barren of evidence that the New Haven Fire Department ever passively permitted, let alone actively condoned, intentionally discriminatory employment practices.

Nor can the government argue that it has a compelling interest in remedying the *unintentional* disparate impact the Board claims it *would have* caused by certifying the results. While there was a racial imbalance among the group of passing applicants, "the Constitution is not violated by racial imbalance ... without more." *Parents Involved*, 127 S.Ct. at 2752. There is a "distinction between segregation by state action and racial imbalance caused by other factors" that has been "central" to the Court's jurisprudence "for generations." *Id.* at 2761. If that jurisprudence shows anything, it is that state action worthy of remedial, race-based measures must involve *intentional* racial discrimination, not color blind actions that merely have a disparate impact. *See id.* at 2761 (taking the dissent to task for failing to recognize the distinction between "*de jure* and *de facto*" segregation).

Unable to point to any constitutional obligation to discard the exam results, the Board directs its attention to Title VII. But even if the Board believed that promoting the highest scoring applicants would violate Title VII, that is not enough. "The Constitution and [the Court's] precedents require more" than the "good faith" of the state actors who engage in racial discrimination. *Parents Involved*, 127 S.Ct. at 2766. Under the two pronged strict scrutiny test, the Board must establish that (i)

compliance with Title VII is, *ipso facto*, a compelling state interest; and (ii) scrapping the test results was the least restrictive way of complying with Title VII. The Board can do neither.[5]

Compliance with Title VI cannot supply a compelling government interest because a statutory obligation cannot trump a constitutional command. The Court made this self-evident observation "explicit" in *Adarand*, holding that "[f]ederal racial classifications, like those of a State," are not immune from the strictest scrutiny just because Congress enacted that classification. *Adarand*, 515 U.S. at 235. Were it otherwise, the Fourteenth Amendment would be a nullity. As Judge Easterbrook has observed, if compliance with governmental regulations could "supply a compelling governmental interest in making decisions based on race," then the government could "adopt racial quotas" and the "direction would be self-justifying....Such a circular process would drain the equal protection clause of meaning." *Biondo v. City of Chicago*, 382 F.3d 680, 684 (7th Cir. 2004) (rejecting argument that Title VII supplied a justification for the Chicago Fire Department's affirmative action plan).[6]

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[5] It should be noted that the Board is not claiming that compliance with Title VII would *serve* a compelling government interest: the board is claiming that compliance with Title VII is *itself* a compelling government interest.

[6] Nor is it relevant that the Board is a local government entity, compelled to comply with Title VII. If "blind judicial deference to legislative or executive pronouncements of necessity has no place in equal protection analysis" when scrutinizing a federal actor's compliance with federal law, *see Croson*, 488 U.S. at 501,

Using a federal law to justify intentional racial discrimination, irrespective of whether that law serves a compelling governmental interest, is problematic enough. Allowing Title VII to do so is even worse, because this would wipe out the critical constitutional distinction between public and private employers. This Court has "always ... employed a *more stringent* standard ... to test the validity of the *means* chosen by a State to accomplish its race-conscious purposes," than those chosen by private actors to comply with their obligations under Title VII. *Wygant*, 476 U.S. at 279 (emphasis added). It is for this reason that "*public* employers must [separately] justify the adoption and implementation of a voluntary affirmative action plan under the Equal Protection Clause," irrespective of what Title VII may allow or purport to dictate. *Johnson v. Transportation Agency, Santa Clara County, Cal.*, 480 U.S. 616, 620 n. 2 (1987) (rejecting argument that Title VII and the Equal Protection Clause are "coterminous.").

The dangers of allowing Title VII to supplant Equal Protection analysis is evident. Title VII is economic legislation, "enacted pursuant to the commerce power to regulate purely private decision-making and ... [is] not intended to incorporate and particularize the commands of the Fifth and Fourteenth Amendments." *Johnson*, 480 U.S. at 628 n. 6. As such, no matter how legitimate the interests served by Title VII, because it is not limited to remedying past governmental discrimination or

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then such deference also has no place when scrutinizing a State actor's compliance with that same law.

promoting diversity, it is not confined to serving "compelling governmental interests." It is broader in reach and sanctions more race-conscious actions, at least by private parties, than has been permitted by public employers under this Court's prior decisions.

Nothing in this Court's prior cases suggests the Title VII was meant to *loosen* the restrictions against state-sanctioned discrimination. Rather, as *Transportation Agency* makes clear, the obligation of a public employer under Title VII was only "intended to extend *as far as*" the Constitution allows, not farther. *Id.* This is as it should be. To hold otherwise would only postpone the day when race will no longer be a factor in governmental hiring decisions. *Parents Involved*, 127 S.Ct. at 2768 ("The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.").

The Board's "Title VII made me do it" theory, therefore, fails the first prong of the strict scrutiny test. It also fails the second. Certainly, nothing in Title VII *requires* a state or local government to engage in intentional racial discrimination. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801(1973) ("it is abundantly clear that Title VII tolerates no racial discrimination, subtle or otherwise"). To the contrary, Congress made it clear that an employer's desire to mitigate or avoid a disparate impact does not justify preferential treatment for any group. *See* 42 U.S.C. § 2000e-2(j). Because the Board cannot show that certification of the exam results would violate Title VII, its decision not to certify the results was not narrowly tailored to comply with Title VII.

- **Racial Diversity Justification.**

The Board's third reason for discarding the exam results is its claim that promoting off of this list would "undermine [its] goal of diversity." *Ricci*, 554 F.Supp.2d at 162. In the Board's view, too few minorities passed the test to ensure that the pool of supervisors reflects the same racial mix as the pool of pre-test applicants. But the Board's desire to have more black supervisors, "for no reason other than their race or ethnic origin," is not merely insufficiently compelling to justify racial classifications, it was "discrimination for its own sake, forbidden by the Constitution." *Parents Involved*, 127 S.Ct. at 2779 (quoting *Bakke*, 438 U.S. at 307 (Powell, J.)).

Invocation of the buzzword "diversity" cannot hide the fact that the Board was really playing a numbers game. The Board is only the latest of many state actors to raise the diversity umbrella since the Court first recognized that, in limited circumstances, diversity can provide a state with the compelling interest necessary to justify racial discrimination.

But in *Parents Involved*, this Court exposed that ploy and put a definitive end to it. "Racial balancing is not transformed from 'patently unconstitutional' to a compelling state interest simply by re-labeling it 'racial diversity.'" 127 S.Ct. at 2758. Put simply, "racial balance ... itself cannot be the goal, whether labeled 'racial diversity' or anything else." *Id.* at 2759. Because the "Equal Protection Clause protects persons, not groups," *id.* at 2765, any interest in promoting diversity must focus on "each applicant as an *individual*, not simply as a member of a

particular group." *Id.* at 2753 (citing *Grutter*, 539 U.S. at 326) (emphasis added).

Here, the Board, like the lower court, did not focus on the successful promotion applicants as individuals. It scrapped the test results because "too many whites" and "not enough minorities" had passed. *Ricci*, 554 F.Supp.2d at 152. Its decision to reject the results was, therefore, "tied to ... racial demographics, rather than any pedagogic concept of the level of diversity needed to obtain" specific, clearly articulated benefits in the workplace. *Parents Involved*, 127 S.Ct. at 2743.

The Board never identified just what would be compelling about its insistence on a more racially diverse group of supervisors. Certainly it never suggested that a different racial mix of supervisors would lead to faster response times, better service, or more efficient operations. At most, the Board speculated that promoting minorities because of their race, rather than because of their qualifications, would provide better "managerial role models for aspiring firefighters." *Ricci*, 554 F.Supp.2d at 162. But this just perpetuates the myth that the only role models an "aspiring firefighter" looks up to are those with the same color skin, and not those who have worked hard and excelled at their jobs. The myth itself "demeans the dignity and worth" of every applicant and aspiring firefighter because it judges them "by ancestry instead of [their] own merit and essential qualities." *Parents Involved*, 127 S.Ct. at 2767.

Nor did the Board conduct the type of "holistic review" that *Grutter* held could justify the use of race to advance diversity in a different context. *Grutter*,

539 U.S. at 337. The Board did not look at the individual applicants who passed the City's exam and conclude that, aside from their skin color, they might otherwise contribute to a diverse workplace by, for example, examining their background, upbringing, education, interests, or otherwise. The Board never presented any evidence that a different crop of applicants would better serve the community. It simply decided that there were too few minorities and too many whites.

This is exactly the type of "non-individualized, mechanical" race-based decision-making that offends the Constitution. *Parents Involved*, 127 S.Ct. at 2754 (quoting *Gratz*, 539 U.S. at 276 (O'Connor, J., concurring)). As this Court explained, "this working backward to achieve a particular type of racial balance, rather than working forward from some demonstration of the level of diversity that provides the purported benefits, is a fatal flaw under our existing precedent." *Id.* at 2758.[7]

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[7] Because the Board's diversity rationale was synonymous with "patently unconstitutional" racial balancing, the Board has yet to identify a "compelling governmental interest" to justify its actions. Thus, there is no need to determine whether the Board's actions were "narrowly tailored" to achieve its goals. Likewise, because the Board has failed to articulate a compelling interest, there is no merit to the Board's argument that discarding the exam results was a necessary first step in achieving its as-yet-unidentified objectives. In any event, it should be noted that the Board did not consider any less restrictive or non-racial alternatives to achieve such unarticulated interests. *Croson*, 488 U.S. at 507.

III. The Decision Below Undermines The Public Interest In Cohesion, Retention, and Recruitment In The Public Safety Sector

The foregoing sections of this Brief explain why, as a *legal* matter, the Court's most searching requirements for government's race-based decisionmaking should apply. But NAPO also believes it is important for the Court to understand why, as a *practical* matter, the Court should hold the type of decisionmaking here to the strictest of standards. The police departments, officers, and unions represented by NAPO, just like the fire departments and firefighters at issue here, must of course live with and abide by this Court's decisions and the impact they have on them as brothers and sisters-in-arms in the quest for public safety. The Court, NAPO respectfully believes, should therefore take heed of just what that impact is before issuing its decision.

The racial politics injected far too frequently into the daily lives of public safety officers comes most often not from the officers themselves – who are, in the main, effectively colorblind – but rather from the outside. Those outside sources, often agenda-driven activists or over-ambitious politicians, can contribute to a toxic atmosphere in which the paramount duty of safety and justice risks being crowded out by race-based fear-mongering. The racial politicking described by the plaintiffs here, and acknowledged by the district court, is exceedingly familiar to NAPO and its constituents. No police or fire department of modest or greater size is immune from the corrosive impact of racial politics. Not a single one would claim that racial politics enhance a department's

ability to solve crimes or fight fires; indeed, frequently the opposite is true.

None of this is to say that issues of equality, opportunity, and diversity are not important to NAPO and its friends in the public safety arena. To the contrary, police and fire departments have been among America's leaders in offering members of minority groups opportunities to join their organizations and advance according to their abilities. Nor does NAPO suggest that the historic mistreatment of some minority groups by governments and their agents have left no continuing legacy. NAPO's constituents simply believe that the best way to do the jobs required of them in service of the citizenry, *and* to address these legacy issues, is to insist that, to the fullest extent permitted by law, public safety organizations operate as strict meritocracies.

Such meritocracies contribute to two of the more important factors in a public safety work environment: camaraderie and fairness. Among crime-fighters and firefighters, the importance of camaraderie can hardly be overstated; when lives are at stake, the trust and respect bred by camaraderie directly affects one's ability to persevere through the most difficult of circumstances. That camaraderie is undermined when officers are made to feel like members of a *race*, rather than members of a *team*.

While camaraderie largely applies to the relationship among fellow officers, fairness primarily applies to the relationship between officers and supervisors. The impact of race-based promotion decisions does not end when the Board votes; officers

and supervisors must live and cope with these decisions in their station houses. In addition to impacting "life in the house," fairness issues directly influence NAPO's constituents' ability to recruit and retain the best personnel. If recruits and current officers understand that they are entering or working within a world in which they will be judged based on their abilities and their continuing acquisition of skills and knowledge, they will find public service a worthy investment of their time and sweat. If, however, they are forced to contend with the implications of non-meritorious factors like the color of their skin, their gender, or other irrelevant characteristics in their pursuit of advancement, they may understandably consider other career opportunities.

The facts of this case provide a cautionary tale for the potential of racial politics to inflict a deleterious impact on a department's recruitment and retention. Consider the example of Plaintiff Michael Marcarelli, a notoriously high-achiever who finished first on the Captain's exam. *See* Pet. for Writ of Cert. of Frank Ricci, et. al, at 39-40. Mr. Marcarelli, described as having "extraordinary credentials, education, and experience," is precisely the kind of person every police and fire organization wants to recruit and cultivate. *See id.* at 40. The Board's decision to deny him his promotion, solely because he is white, can impose a destructive impact on New Haven's ability to keep this particular Mr. Marcarelli, and other municipalities' ability to attract and retain Mr. Marcarelli's of their own.

Consider also the example of Plaintiff Frank Ricci. The costs to Mr. Ricci in taking one of the civil service exams were "8 to 13 hours a day" of study

and more than "$1,000 in funds," incurred in no small part because Mr. Ricci is dyslexic and needed to pay someone to read the study materials onto tape. *Ricci*, 530 F.3d at 104. Mr. Ricci also passed the test, but could not overcome his other "disability": his skin color. Again, NAPO's members want the Mr. Ricci's of the world – whether they are learning impaired in some manner, or perhaps come from a background in which formal, advanced education was not an option – to join its departments, to work hard, and to go as far as their talents will take them. Their incentives for doing so, however, are undermined by race-based decisions like the one at issue here.

Particularly in this new day in which our new President was launched on the national scene by declaring "[t]here is not a Black America and a White America and Latino America and Asian America – there's the United States of America," NAPO and its partners in law enforcement look forward to a time in which people are not "black" police officers or "white" officers, or "black" firefighters or "white" firefighters. But when they are just police officers. And firefighters. United in pursuit of the betterment of our innumerable communities, free from the corrosive impact of racial politicking. A decision striking a blow against such corrosion will help make that ideal a reality.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the Court of Appeals.

Respectfully submitted.

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February 26, 2009

Nos. 07-1428 and 08-328

In the Supreme Court of the United States

FRANK RICCI, ET AL., Petitioners,

v.

JOHN DESTEFANO, ET AL., Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES AND THE NATIONAL WOMEN'S LAW CENTER, ET AL. AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

1. Whether respondents' failure to certify the results of promotional examinations violated the disparate-treatment provision of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a).

2. Whether respondents' failure to certify the results of promotional examinations violated 42 U.S.C. § 2000e-2(l), which makes it unlawful for employers "to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests of the basis of race."

3. Whether respondents' failure to certify the results of promotional examinations violated the Equal Protection Clause of the Fourteenth Amendment.

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INTEREST OF AMICI CURIAE

The *National Partnership for Women & Families* (The National Partnership) is a non-profit, national advocacy organization founded in 1971 that promotes equal opportunity for women, quality health care, and policies that help women and men meet the demands of both work and family responsibilities. The National Partnership has devoted significant resources to combating sex, race, age, and other forms of invidious workplace discrimination and has filed numerous briefs *amicus curiae* in the U.S. Supreme Court and in the federal circuit courts of appeal to advance the opportunities of protected individuals in employment.

The *National Women's Law Center* (NWLC) is a nonprofit legal advocacy organization dedicated to the advancement and protection of women's legal rights. Since 1972, NWLC has worked to secure equal opportunity for women in the workplace, including in fields that are nontraditional for women, and has promoted voluntary compliance by employers with federal and state civil rights laws. NWLC has prepared or participated in the preparation of numerous *amicus* briefs in cases involving Title VII and the equal protection clause in this Court and in federal circuit courts of appeals.

The National Partnership and the NWLC are joined in filing this brief by 27 other organizations that share a longstanding commitment to civil rights and equality in the workplace for all Americans. The individual organizations are described in the attached appendix.

SUMMARY OF ARGUMENT*

This Court and Congress have long made clear that Title VII prohibits both disparate impact and disparate treatment discrimination as coequal and complementary components of the Civil Rights Act's commitment to equal opportunity in the workplace. Indeed, the disparate impact standard has proven enormously effective in opening doors to employment previously closed to women. Women's entry into the paid firefighting corps, for example, was made possible in large part by disparate impact challenges to a wide variety of recruitment, hiring, and promotion practices that would otherwise likely have remained unexamined and unchanged.

Despite these successes, however, the disparate impact standard's work is not yet done, as women remain substantially underrepresented in firefighting and other traditionally male jobs. Given the persistence of sex discrimination in these fields, employers have a continuing responsibility to monitor their practices for disparate impact and to take action to address such impact when it occurs. If employers are unable to improve on practices that impose an adverse impact, women's access to many jobs will remain limited.

Indeed, New Haven did just what this Court and Congress hoped and expected employers would do in

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* Counsel of record states that the parties have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part, and no person or entity – other than the *amici curiae*, their members, and their counsel – made a monetary contribution to the preparation or submission of this brief.

light of Title VII's prohibition of disparate impact discrimination. The city reacted to findings of its employment practice's severe disparate impact by reconsidering its use of that practice. In light of additional evidence that substantiated the discriminatory inference created by the disparate impact (*e.g.*, evidence of the test's invalidity as well as evidence of less discriminatory alternatives), the city then declined to use that practice. Declining to impose an unlawful disparate impact against some protected class members is not an act of intentional discrimination against others. To the contrary, requiring employers to continue to use a selection device despite knowledge of its disparate impact – or, in the alternative, encouraging employers to remain ignorant of their practices' disparate impact, as petitioners' argument suggests – would frustrate Title VII's fundamental goal of undermining longstanding job segregation and hierarchy.

An employer that declines to use a test that imposes a disparate impact on certain protected classes thus does not engage in disparate treatment in violation of Title VII because it does not intend to treat members of other protected classes differently – nor *does* it treat them differently. Nor does a public employer who declines to use such a test purposefully classify individuals based on protected class status in violation of the equal protection clause. The employer's action itself – the facially neutral decision *not* to use a practice that imposes a disparate impact – is an act of *non*discrimination under both statutory and constitutional standards.

ARGUMENT

I. TITLE VII'S DISPARATE IMPACT STANDARD HAS PROVEN ENORMOUSLY EFFECTIVE IN CHALLENGING EMPLOYER PRACTICES THAT EXCLUDED WOMEN FROM JOBS IN FIREFIGHTING AND ELSEWHERE IN THE PUBLIC AND PRIVATE SECTORS.

Employment practices that impose an unlawful disparate impact – i.e., measures that disproportionately exclude protected class members from job opportunities without adequate justification – frustrate Title VII's objectives in at least two ways. First, employment practices that disproportionately disadvantage women and people of color without any meaningful relationship to successful job performance may sometimes conceal an employer's intent to discriminate. See *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 426-30 (1971) (observing that employer's non-job-related tests disproportionately excluded African-Americans from jobs that "formerly had been filled only by white employees as part of a longstanding practice of giving preference to whites" and thus operated "to 'freeze' the status quo of prior discriminatory employment practices").

Second, even absent an employer's discriminatory intent, employment practices that impose a disparate impact often reflect unexamined assumptions and stereotypes about the skills and capabilities that predict successful job performance. See *id.* at 431-32 ("What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to

discriminate on the basis of racial or other impermissible classification. * * * [G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability.").

For these reasons, this Court has long held that Title VII prohibits both disparate impact and disparate treatment discrimination as coequal components of the Civil Rights Act's commitment to ensure equal opportunity in the workplace. *Griggs*, 401 U.S. at 431-32 ("The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. . . . Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation.") (emphasis in original); see also *Franks* v. *Bowman Transp. Co.*, 424 U.S. 747, 763 (1976) (emphasizing that Title VII "prohibit[s] all practices in whatever form which create inequality in employment due to discrimination"); *Watson* v. *Fort Worth Bank & Trust*, 487 U.S. 977, 987 (1988) ("[T]he necessary premise of the disparate impact approach is that some employment practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination.").

Congress confirmed its intent to prohibit both disparate treatment and disparate impact discrimination as unlawful barriers to equal employment opportunity when it codified Title VII's disparate impact standard in the Civil Rights Act of 1991. See 42 U.S.C. § 2000e-2(k). Congress there made clear its determination to restore a robust

understanding of the disparate impact standard. Finding that "the decision of the Supreme Court in *Wards Cove Packing Co.* v. *Atonio*, 490 U.S. 642 (1989) has weakened the scope and effectiveness of Federal civil rights protections," Congress specifically identified the Act's purposes to include "codify[ing] the concepts of 'business necessity' and 'job related' enunciated by the Supreme Court in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), and in the other Supreme Court decisions prior to *Wards Cove Packing Co.* v. *Atonio*, 490 U.S. 642 (1989)." Civil Rights Act of 1991, Pub. L. No. 102-166, §§ 2(2) and 3(2).

Women's persistent exclusion from firefighting and other traditionally male jobs exemplifies the dynamic that Title VII and its disparate impact standard seek to address. See *United Steelworkers of Am.* v. *Weber*, 443 U.S. 193, 208 (1979) (emphasizing Title VII's objective to break down longstanding patterns of segregation and hierarchy). No woman had ever served as a paid firefighter in the United States when Congress extended Title VII's reach to include state and local government employers in 1972. Denise M. Hulett, Marc Bendick, Jr., Sheila Y. Thomas, and Francine Moccio, *Enhancing Women's Inclusion in Firefighting in the USA*, 8 INT'L J. OF DIVERSITY IN ORGANISATIONS, COMMUNITIES, AND NATIONS 189, 191 (2008) (hereinafter "Hulett et al.") (noting that no woman served as a paid firefighter before 1973). Nor did public safety agencies hire women as firefighters in any significant numbers until the 1980s. *Id.* The City of New Haven, for example, did not hire its first woman firefighter until 1983. See Brief of Plaintiff-Appellee at 4, *Broadnax* v. *City of New Haven*, No. 04-2196 (2nd Cir. Aug. 16, 2004). As discussed below,

women's entry into the paid firefighting corps was made possible in large part by disparate impact challenges to a wide variety of recruitment, hiring, and promotion practices that would otherwise have likely remained unexamined and unchanged.

A. Height and Weight Requirements

For example, attention to disparate impact led to the elimination of agencies' height and weight requirements that disproportionately excluded women from a wide range of public safety jobs without any demonstrable connection to successful job performance. See, *e.g.*, *Dothard* v. *Rawlinson*, 433 U.S. 321, 331-32 (1977) (striking down Alabama's height and weight requirements for correctional counselors because they disproportionately excluded women without any showing of job-relatedness); *Costa* v. *Markey*, 706 F.2d 1, 6 (1st Cir. 1982) (police department's height requirement imposed unjustified disparate impact on women in violation of Title VII); *United States* v. *Virginia*, 620 F.2d 1018, 1024 (4th Cir. 1980) (Virginia State Patrol's height and weight requirement disproportionately excluded women without basis in business necessity in violation of Title VII); *Horace* v. *City of Pontiac*, 624 F.2d 765, 768-69 (6th Cir. 1980) (police department's height requirement imposed unjustified disparate impact in violation of Title VII).

B. Physical Ability Tests

Attention to disparate impact also led to changes in employers' physical ability tests that disproportionately excluded women from firefighting and other traditionally male jobs without a proven

connection to workforce quality. To be sure, firefighters and other public safety officers must be strong and fit. But ostensibly neutral physical ability tests have sometimes been designed and implemented as part of a calculated strategy to exclude women. For example, a case study of the Minneapolis Fire Department – now among the nation's leaders in the diversity of its firefighting corps – suggests that its physical ability test was at one time purposefully manipulated to disadvantage women:

> The physical abilities test as part of the process was different every time. Many of the women now on the department are convinced the changes were made in order to keep women out. One woman said, "In our recruit class, instead of actually training, we spent most of our time going through various types of tests. The things the women didn't have trouble with, they'd drop; the things that were harder for women, they'd keep."

International Ass'n of Women in Fire and Emergency Services, *Minneapolis Walks the Walk*, http://www.i-women.org/archive_articles.php (last visited March 18, 2009).

Even absent an intent to discriminate against women, many fire departments' choice of physical ability tests operated to exclude women without any demonstrated connection to successful job performance:

> The remaining 54.2% [of fire departments surveyed] simply use "home grown" tests,

> many of which are ad hoc and reflect little attention to professional standards for test development and validity. For example, some tests reject trainees for slowness in sprinting when many departments forbid sprinting as fatiguing and exacerbating smoke inhalation. Others impose extreme requirements for strength in isolated muscle groups (e.g., an 85 pound bicep curl performed while standing flat against a wall), rather than testing the whole body strength which firefighting involves. Still others test upper body strength, where men typically out-perform women, without measuring stamina and agility, which are also necessary for firefighting and where women often outscore men.

Hulett et al. at 198.

For these reasons, courts in a wide range of jurisdictions have struck down public safety agencies' physical ability tests that disproportionately denied jobs to women without any meaningful relationship to the jobs' actual physical requirements. *E.g.*, *Pietras* v. *Board of Fire Comm'rs*, 180 F.3d 468, 475 (2nd Cir. 1999) (fire department's timed physical agility test that disproportionately excluded women violated Title VII because city failed to prove that the passing score was job-related); *Harless* v. *Duck*, 619 F.2d 611, 616 (6th Cir. 1980) (police department's physical ability test violated Title VII because it disparately impacted women and the city failed to prove that the tested exercises and passing scores were related to the

physical requirements of the job); *United States* v. *City of Erie*, 411 F. Supp. 2d 524, 568-70 (W.D. Pa. 2005) (invalidating police department's physical agility test that disproportionately excluded women as neither job-related nor justified by business necessity); *Thomas* v. *City of Evanston*, 610 F. Supp. 422, 432 (N.D. Ill. 1985) (holding that police department had failed to justify its physical agility test that imposed a disparate impact against women); *Berkman* v. *City of New York*, 536 F. Supp. 177 (E.D.N.Y. 1982) (fire department's physical ability test that disparately impacted women violated Title VII because it was not sufficiently job-related). Courts have also applied the disparate impact standard to strike down physical ability tests that disproportionately excluded women from traditionally male jobs in the private sector without any proven connection to successful job performance. See *Equal Employment Opportunity Comm'n* v. *Dial*, 469 F.3d 735, 743 (8th Cir. 2006) (upholding district court's finding that sausage packing company violated Title VII with its use of a pre-employment strength test that disproportionately excluded women without a demonstrated relationship to safe and effective job performance).

Indeed, the disparate impact standard led to the development of physical ability tests that more accurately screen for qualified firefighters while expanding job opportunities for members of traditionally excluded groups. Over time, for example, Minneapolis' willingness to think more carefully about its physical ability tests led to the development of new selection devices that advanced both merit standards and equal opportunity. In the words of Fire Department Chief Rocco Forte, "There's no reason to lower your standards for diversity. We've actually

raised ours. There was no physical fitness tie to job functions before. People could do sit-ups, but could they perform a rescue?" International Ass'n of Women in Fire and Emergency Services, *Minneapolis Walks the Walk*, http://www.i-women.org/archive_articles.php (last visited March 18, 2009).

C. Other Selection Devices

The disparate impact standard also triggered examination and reconsideration of a wide range of promotion practices and other devices that disproportionately deprived women of job opportunities in public safety jobs without any meaningful tether to successful job performance. For example, the Sixth Circuit found that a police department's use of structured oral interviews as a selection device was "rife with the potential for discrimination and is not job-related" because the practice disparately impacted women without any relationship to actual job performance and was instead subject to a host of errors due to a lack of standardized conditions and objective criteria. *Harless* v. *Duck*, 619 F.2d 611, 616-17 (6th Cir. 1980). The Ninth Circuit similarly held that a sheriff's department's written promotion examination violated Title VII because it disproportionately excluded women without any evidence of business justification. *Bouman* v. *Block*, 940 F.2d 1211, 1227-28 (9th Cir. 1991). A federal district court, furthermore, invalidated Milwaukee's policy of hiring as paramedics only individuals who were also Milwaukee firefighters because that requirement excluded women entirely (no woman had ever been hired as a Milwaukee firefighter) without a showing of business necessity (paramedics "seldom, if ever, perform firefighting duties (and are never relied upon to extinguish fires) during their

regular work week"). *United States* v. *City of Milwaukee*, 481 F. Supp. 1162, 1164-65 (E.D. Wis. 1979). And the U.S. Equal Employment Opportunity Commission recently found that the Houston Fire Department's implementation of new promotional rules – which grant significant advantage to those firefighters with tenures longer than ten years – had an unlawful disparate impact upon women. L.M. Sixel, *They Want To Climb Fire Ladder, But Can't*, HOUSTON CHRONICLE, Jan. 4, 2008, available at http://www.chron.com/disp/story.mpl/moms/5427037.html (last visited March 23, 2009).

D. On-the-Job Working Conditions

By enabling challenges to working conditions that disproportionately disadvantage women once they achieve entry into traditionally male fields, Title VII's disparate impact standard helps women stay in these jobs and further break down patterns of occupational segregation. See, *e.g.*, *DeClue* v. *Central Illinois Light Co.*, 223 F.3d 434, 436 (7th Cir. 2000) (observing that a utility's failure to provide restrooms to its employees disproportionately deters women from certain jobs without any basis in business necessity); *Lynch* v. *Freeman*, 817 F.2d 380, 388-89 (6th Cir. 1987) (construction company's practice of providing unsanitary portable toilets for employees imposed a disparate impact against women without any evidence of business necessity); *Johnson* v. *AK Steel Corp.*, No. 1:07-cv-291, 2008 WL 2184230, at *8 (S.D. Ohio May 23, 2008) (concluding "that the practice of requiring women to urinate off the side of a crane in lieu of restroom breaks, if true, would have a significant discriminatory impact on women"); *James* v. *National*

R.R. Passenger Corp., No. 02-cv-3915, 2005 WL 6182322 at *5-6 (S.D.N.Y. March 28, 2005) (upholding jury verdict that employer's provision of employee bathrooms with no privacy and poor sanitary conditions violated Title VII because it disparately impacted women without any basis in business necessity); *Pumphrey* v. *City of Coeur D'Alene*, No. 92-36748, 1994 U.S. App. LEXIS 3892, at *2 (9th Cir. Feb. 24, 1994) (reversing summary judgment on woman police officer's claim that large-gripped firearm had unlawful disparate impact on women because their hands are, on average, smaller than men's).

By requiring careful examination of employment practices that impose a disparate impact on protected class members, Title VII thus enhances not only equal access to job opportunities, but also a commitment to true merit selection. As this Court has observed, "Nothing in the Act precludes the use of testing or measuring procedures; obviously they are useful. What Congress has forbidden is giving these devices and mechanisms controlling force unless they are demonstrably a reasonable measure of job performance." *Griggs*, 401 U.S. at 437; see also *Thomas* v. *City of Evanston*, 610 F. Supp. 422, 432 (N.D. Ill. 1985) ("Too often tests which on the surface appear objective and scientific turn out to be based on ingrained stereotypes and speculative assumptions about what is 'necessary' to the job. Thus, tests which discriminate against protected groups must be thoroughly documented and validated in order to minimize the risk of unwarranted discrimination against groups which have been traditionally frozen out of the work force."). Moreover, the disparate impact theory appropriately enables regular

assessment of whether workplace conditions – especially those in male-dominated jobs – continue to block women's employment opportunities.

II. PERSISTENT BARRIERS TO EQUAL EMPLOYMENT OPPORTUNITY WILL REMAIN UNADDRESSED UNLESS EMPLOYERS CAN IDENTIFY AND CORRECT THEIR EMPLOYMENT PRACTICES' DISPARATE IMPACT.

As described above, the disparate impact standard made possible challenges – and changes – to a wide variety of recruitment, selection, and promotion practices that had previously excluded women from firefighting and other traditionally male jobs. Yet the disparate impact standard's work is not yet done, as women remain substantially underrepresented in firefighting and elsewhere. For example, women currently comprise only 3.7% of the approximately 350,000 paid firefighters in the United States. Hulett et al. at 191. Firefighting thus falls in the lowest 11th percentile of occupations nationwide in terms of its proportion of women employees. *Id.* Census data, moreover, indicates that approximately half of all fire departments nationwide had no women firefighters as of 2000. See *id.* Indeed, the most recent available data demonstrates that the New Haven Fire Department employs only one woman among its 86 full-time supervisory firefighting positions (comprised of the fire chief, inspectors, captains, and lieutenants) and only ten women out of its 240 full-time rank-and-file firefighters. See City of New Haven, State & Local Gov't Info Report EEO-4 (2007).

A 2008 study, furthermore, calculated that women's representation in the qualified labor pool (i.e., the

number of women with high school degrees currently employed at least 35 hours a week in occupations that require strength, stamina, and dexterity and/or outdoor, dangerous, or dirty work – such as bus mechanics, enlisted military personnel, highway maintenance workers, loggers, professional athletes, welders, roofers) indicates that they should be expected to comprise 17% of all firefighters today. Hulett et al. at 193. The authors concluded that fire departments thus employ women at only 21.8% of their expected representation. *Id.* Women of color face double disadvantage, comprising only .8% of all paid firefighters, compared to an expected representation of 5.9%. *Id.* at 195. The actual representation of women of color in paid firefighting is thus only 13.6% of their expected representation (a representation rate less than half that of white women's 26% actual-to-expected representation ratio). *Id.* Overall, at current rates of change, the authors estimate that women's actual representation in the paid firefighting corps will not match their expected representation (of at least 17%) for another 72 years. *Id.* at 196.

Such substantial underrepresentation is likely due at least in part to the persistence of systemic discrimination, rather than women's lack of interest. That many women are interested in and qualified for firefighting jobs is further demonstrated by the significant number of women employed by certain departments. 2000 Census data, for example, indicate that the following fire departments employ significant proportions of women firefighters: Tuscaloosa, Alabama (women make up 24% of the city's firefighters); Kalamazoo, Michigan (23%); Springfield, Illinois (19%); Racine, Wisconsin (18%); Minneapolis, Minnesota (17%); Redding, California (17%); Madison,

Wisconsin (15%); San Francisco, California (15%); Anchorage, Alaska (14%); Boulder, Colorado (14%), Miami-Dade, Florida (13%); Allentown-Bethlehem-Evanston, Pennsylvania (12%); Sarasota, Florida (12%); and Jacksonville, Florida (11%). *Id.* at 191-92. Indeed, firefighting and other public safety jobs are unusually attractive because they offer quality pay, benefits, job security, pensions, and prestige while generally requiring no education or work experience other than a high school diploma. See *id.* at 190-91. For example, firefighters in 2005 earned an average hourly wage of $19.42, a wage 22.4% higher than that received by the average blue-collar worker. *Id.* Firefighters, moreover, received 64 cents in fringe benefits for every dollar of wages earned – a benefits rate almost double that earned by private–sector service workers. *Id.* at 190. In addition, firefighters often receive half-pay pension for life after 25 years of service, and frequently enjoy a large number of off-duty hours that permit second jobs with additional earnings capacity. *Id.*

Women in firefighting continue to face intentional sex discrimination as well, further contributing to their underrepresentation. Women firefighters report sex discrimination on the job at a rate nearly seven times that of their male counterparts (nearly 85% of women firefighters reported that "I have experienced different treatment because of my gender" compared to 12% of their male counterparts). *Id.* at 192-93. For example, a jury recently found the New Haven Fire Department liable for engaging in intentional sex discrimination against one of its women firefighters, and awarded the plaintiff nearly $1.5 million in damages for her Title VII, equal protection, and First Amendment claims).

See *Broadnax* v. *City of New Haven*, 415 F.3d 265 (2nd Cir. 2005).

Intentional sex discrimination against women firefighters is by no means unique to New Haven. See also *Wedow* v. *City of Kansas City*, 442 F.3d 661, 671-72 (8th Cir. 2006) (failure to provide adequate firehouse bathroom facilities and properly-fitting safety gear is unlawful adverse action under Title VII); Meredith Mandell, *New Jersey Woman Settles Discrimination Lawsuit*, HERALD NEWS, Sept. 9, 2008, available at http://cms.firehouse.com/content/article/article.jsp (last visited on March 23, 2009) ($450,000 settlement of federal lawsuit in which woman firefighter alleged hostile work environment, including "that fellow firefighters taunted her, intimidated her, failed to promote her and failed to pay her overtime," and perpetuated rumors she was sleeping with her supervisor); Jessica Garrison, *Firefighter in L.A. Wins $6.2 Million in Bias Suit*, L.A. TIMES, July 5, 2007 ($6.2 million jury verdict for African American woman firefighter on claims of sexual harassment, discrimination, and retaliation); Tony Plohetski & Kate Alexander, *Austin Officials: Female Firefighter's Locker Defaced*, AUSTIN AMERICAN-STATESMAN, Jan. 10, 2007 (reporting female firefighter's locker smeared with human excrement, and her shampoo bottle filled with urine); Art Marroquin, *Audit Finds Harassment, Discrimination Still Plague LAFD*, CITY NEWS SERVICE, Jan. 27, 2006, available at http://cms.firehouse.com/content/article/article.jsp (last visited on March 23, 2009) (summarizing report by Los Angeles Controller finding that "a culture of discrimination, harassment and hazing against women and minorities still plagues the [city's] Fire Department").

Women's substantial underrepresentation in good jobs in fields with longstanding histories of sex discrimination thus suggests continuing systemic barriers to equal opportunity that are unlikely to be eliminated absent the use of tools like the disparate impact standard. For these reasons, employers like New Haven should remain concerned by and suspicious of tests and other employment practices that disproportionately disadvantage protected class members. Indeed, New Haven did just what this Court and Congress hoped and expected employers would do in light of Title VII's prohibition of disparate impact discrimination. It reacted to findings of its employment practice's severe disparate impact by reconsidering its use of that practice. In light of additional evidence that substantiated the discriminatory inference created by the disparate impact (*e.g.*, evidence of the test's invalidity as well as evidence of less discriminatory alternatives), the city then declined to use that practice.

III. THE CITY OF NEW HAVEN NEITHER ENGAGED IN DISPARATE TREATMENT OF PROTECTED CLASS MEMBERS IN VIOLATION OF TITLE VII, NOR DID IT CLASSIFY INDIVIDUALS BASED ON PROTECTED CLASS STATUS IN VIOLATION OF THE EQUAL PROTECTION CLAUSE.

An employer that acts as New Haven did in this case thus does not engage in unlawful disparate treatment against others because it does not intend to treat members of other protected classes differently – nor *does* it treat them differently. To the contrary, that employer acts entirely consistently with Congress' intent to achieve compliance with both the disparate

treatment and disparate impact prohibitions through voluntary employer action, recognizing that employers are especially well-positioned to evaluate their own employment needs as well as the availability of less discriminatory alternatives. See *United Steelworkers of Am.* v. *Weber*, 443 U.S. 193, 206-08 (1979) (emphasizing Congress' intent to ensure equal employment opportunity while preserving management prerogatives); *Albermarle Paper Co.* v. *Moody*, 422 U.S. 405, 418 (1975) (same); *Johnson* v. *Transportation Agency*, 480 U.S. 616, 641-43 (1987) (emphasizing that Title VII seeks to encourage employers' voluntary efforts to identify and prevent discrimination). Indeed, requiring an employer to continue to use a selection device despite knowledge of its disparate impact – or, in the alternative, encouraging an employer to remain ignorant of its practices' disparate impact, as petitioners' argument suggests – would frustrate Title VII's effort to undermine traditional patterns of segregation and hierarchy. See *Weber*, 443 U.S. at 209.

Nor did New Haven engage in purposeful discrimination against other protected class members that triggers heightened levels of scrutiny under the equal protection clause. Purposeful discrimination for equal protection purposes requires that the decisionmaker acted "because of" – and not merely "in spite of" – the act's adverse consequences for protected class members. *Personnel Admin'r of Massachusetts* v. *Feeney*, 442 U.S. 256, 279 (1979); see also *Parents Involved in Cmty. Sch.* v. *Seattle Sch. Dist. No. 1*, 127 S.Ct. 2738, 2792 (2007) (Kennedy, J., concurring) ("[A] constitutional violation does not occur whenever a decisionmaker considers the impact a given approach might have on students of different races"). New

Haven's actions are instead acts of *non*discrimination under both statutory and constitutional standards.

In the alternative, even if this Court applies heightened scrutiny to a governmental employer's attempt to avoid imposing an unlawful disparate impact, New Haven's action should survive any type of heightened scrutiny because it was necessary to achieving its compelling interest in complying with a federal statute. To be sure, New Haven's interest in complying with a Congressional mandate (as well as this Court's longstanding precedent) is required by the Supremacy Clause. This interest takes on an even more compelling quality with respect to a federal law that is dedicated to ensuring equal opportunity in the workplace.

CONCLUSION

For these reasons, the judgment of the Second Circuit should be affirmed.

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March 25, 2009

APPENDIX

APPENDIX A

INDIVIDUAL STATEMENTS OF INTEREST OF *AMICI CURIAE*

9to5, National Association of Working Women is a national membership organization of low-wage women founded in 1973 to achieve workplace equity for women. 9to5 engages low-wage women in speaking out to improve corporate and public policies that create good jobs with family-flexible policies, combat discrimination, and strengthen the safety net for low-income families. 9to5 talks to thousands of women and employers annually, on our Job Survival Helpline and through our training programs, about job discrimination and other workplace issues. We believe that limiting the ability of employers to voluntarily remedy discriminatory policies and practices against women will severely exacerbate gender-based workplace inequities.

For over 125 years, the *American Association of University Women* (AAUW) has been a catalyst for the advancement of women and their transformation of American society. AAUW's more than 100,000 members belong to a community that breaks through educational and economic barriers so all women have a fair chance. With more than 1,300 branches across the country, AAUW works to promote equity for all women and girls through education, research, and advocacy. AAUW supports civil rights laws such as Title VII that protect women and other minorities from workplace discrimination and lower the potential for incidents of disparate impact against women and other protected classes. AAUW further supports the ability of

employers to pursue voluntary remedies to discriminatory workplace policies.

The *American Nurses Association* ("ANA") was founded over a century ago, and today it represents the interests of the Nation's 2.9 million registered nurses. The ANA is comprised of 51 constituent member associations, with RN members in every state of the United States and the District of Columbia. ANA has approximately 180,000 members. In addition, there are 23 specialty nursing organizations that are Organizational Affiliates of the ANA and that have a combined, additional membership of approximately 330,000 RNs. ANA not only develops the Code of Ethics for Nurses and the standards of nursing practice, it actively promotes patient safety, workplace rights, appropriate staffing, workplace and environmental health and safety, and the public health. Fundamentally, ANA supports the ability of employers to proactively correct practices that have a discriminatory impact on employees, because such an approach is consistent with the intent of federal laws.

A Better Balance is a non-profit organization that seeks to promote equality and expand choices for men and women at all income levels so they may care for their families without sacrificing their economic security. Since 2005, A Better Balance has employed a range of legal strategies to promote flexible workplace policies, end discrimination against caregivers and value the work of caring for families. A Better Balance is committed to advancing equality in employment for people with family responsibilities and we champion Title VII and the theory of disparate impact as critical tools for combating discrimination against caregivers, especially mothers, in the workplace.

The *Coalition of Labor Union Women* (CLUW) is an AFL-CIO affiliate with over 20,000 members located throughout the United States, a majority of who are women. Since 1974, CLUW has advocated to strengthen the role and impact of women and people of color in every aspect of their lives. CLUW focuses on key public policy issues such as equality in educational and employment opportunities, affirmative action, pay equity, national health care, labor law reform, family and medical leave, reproductive freedom and increased participation of women in unions and in politics. Through its more than 80 chapters across the United States, CLUW members work to end discriminatory laws, and policies and practices adversely affecting women and workers of color, through a broad range of educational, political and advocacy activities. CLUW has frequently participated as *amicus curiae* in numerous legal cases involving issues of gender and race discrimination and pay equity. CLUW provides training and educational support to its members on issues relating to Title VII enforcement and prevention of workplace harassment and discrimination and encourages adoption of policies and programs that encourage voluntary remedial efforts to eliminate policies that permit or perpetuate employment discrimination against women and people of color.

Connecticut NOW is the state chapter of the National Organization for Women, a multi-issue organization devoted to the elimination of all forms of discrimination against women. We work for the personal, professional, and political empowerment of women in our state. Our 2009 priority areas are media and financial literacy, public financing of

elections/electing women to office, and women's health and safety. We sign on to this amicus brief because of our focus on women's professional empowerment, which is impossible if sex discrimination is not eliminated from Connecticut's workplaces.

The *Feminist Majority Foundation* (the Foundation), is a non-profit organization with offices in Arlington, VA and Los Angeles, CA. The Foundation is dedicated to eliminating sex discrimination and to the promotion of women's equality and empowerment. The Foundation's programs focus on advancing the legal, social, economic, and political equality of women with men, countering the backlash to women's advancement, and recruiting and training young feminists to encourage future leadership for the feminist movement. To carry out these aims, the Foundation engages in research and public policy development, public education programs, litigation, grassroots organizing efforts, and leadership training programs.

Greater New Haven NOW is the local (New Haven County) chapter of the National Organization for Women, a multi-issue organization devoted to the elimination of all forms of discrimination against women. Recent activities of our chapter have focused on peace, violence against women, human rights, sexual harassment in the workplace, and women's history. In addition to our public policy work, we provide advice and support to individual women who contact us with horror stories about sexism and violence in their own lives. Recent cases include workplace discrimination, divorce, domestic violence, and unsafe streets. We sign on to this amicus brief because we know that employers do not always comply

with Title VII and because we fear that, if Mayor DeStefano loses this case, it will set back his and our efforts to eliminate sex discrimination from the workplaces in Greater New Haven.

The *International Association of Women in Fire & Emergency Services* is in support of the City of New Haven. Firefighting as a career for young women is not perceived to be the norm, in large part because the job is perceived to be about fighting fire, when in reality 60 to 80% of emergency calls are for medical emergencies (depending on the department). Whereas non-traditional careers such as the military, law enforcement, and construction trades have on average 17% women, the fire service measures in at under 4%. The prognosis for the future is not good unless the fire service takes proactive steps to solve the disparity. Local municipalities need to have the ability to remedy discrimination in a number of areas including hiring, retention, and promotions to enable our local fire departments to be more representative of the communities we serve.

Legal Momentum (formerly NOW Legal Defense and Education Fund) has worked to advance women's rights for nearly forty years. One priority for Legal Momentum is assuring equal employment opportunity for women in historically male-dominated fields, such as firefighting, law enforcement, and the construction trades. Legal Momentum advocates in the courts and with policymakers to promote women's access to these jobs. Legal Momentum also litigates cases and participates as *amicus curiae* to combat sex discrimination and to promote affirmative action to correct longstanding discriminatory practices. Many

policies and practices in male-dominated jobs fall more heavily on women – from outdated physical entrance exams that do not correlate with job duties, to lack of adequate restroom facilities, to light-duty policies that do not accommodate pregnancy. It is thus imperative that the law permit employers broad latitude to identify and correct such disparate impact.

The *Myra Sadker Foundation* is a non-profit organization dedicated to promoting equity in and beyond schools. By working to eliminate gender bias, the Foundation enhances the academic, psychological, economic and physical potential of America's children. The Foundation supports research, training and special programs for teachers, parents, children and all those whose work and interests touch the lives of children. As part of this goal, the foundation opposes unfair testing and assessment policies and practices.

The *National Alliance for Partnerships in Equity* (NAPE) is a consortium of state and local education and workforce development agencies who have joined forces to work collaboratively to promote equity in education and workforce development programs. NAPE's membership is committed to the creation of equitable classrooms and workplaces where there are no barriers to opportunities, including workplace discrimination. We support the work being done by the National Partnership for Women and Families and the National Women's Law Center on this case to ensure that women who have chosen to pursue a nontraditional career do not have to face discrimination either in the hiring process or in the workplace.

The *National Association of Commissions for Women* (NACW) serves as the professional organization for Commissions for Women across the country. Some 200+ women's commissions exist, each working towards equality and equity for women in their cities, counties and states. It is in this spirit of equality and equity that NACW wishes to support the amicus brief in the case of *Ricci v. DeStefano.* Women continue to face institutional discrimination in a large number of arenas. While Title VII was passed to eliminate such barriers, our experience has been that these discriminatory practices continue to exist and, in some cases, to flourish. It is crucial to our fundamental beliefs in democracy that Title VII be enforced and that employers recognize employer's obligation and duty to remedy discrimination wherever and whenever it occurs. Sex discrimination cannot be tolerated nor encouraged.

The *National Association of Women Lawyers* is the oldest women's bar association in the United States. NAWL's members include individuals and organizations. Headquartered in Chicago, the organization is over one hundred years old. NAWL works to advance the interests of women in and under the law and to eliminate violence and discrimination against women. NAWL acts as amicus curiae and advises legislators and policymakers. NAWL has an interest in achieving and maintaining workplace equality for all.

A division of the Feminist Majority Foundation, the *National Center for Women and Policing* (NCWP), promotes increasing the numbers of women at all

ranks of law enforcement as a strategy to improve police response to violence against women, reduce police brutality and excessive force, and strengthen community policing reforms. Many of the issues that this brief will address, particularly those dealing with discriminatory hiring policies, relate directly to our work at the Center. We are excited to join with the National Women's Law Center on this case to work to ensure that employers are never legally permitted to implement hiring policies that have a disparately negative impact on women.

The *National Council of Jewish Women* (NCJW) is a grassroots organization of 90,000 volunteers and advocates who turn progressive ideals into action. Inspired by Jewish values, NCJW strives for social justice by improving the quality of life for women, children, and families and by safeguarding individual rights and freedoms. NCJW's Principles and Resolutions state that "equal rights and equal opportunities for women must be granted" and the organization endorses and resolves to work for "the enactment and enforcement of laws and regulations that protect civil rights and individual liberties for all." Consistent with our Principles and Resolutions, NCJW joins this brief.

The National Employment Law Project (NELP) works to restore the promise of economic opportunity in the 21st century job market. In partnership with national, state and local allies, we promote policies and programs that create good jobs, strengthen upward mobility, enforce hard-won worker rights, and help unemployed workers regain their economic footing through improved benefits and services. Central to the

promise of a good job and economic opportunity is a workplace and workforce that is free from illegal discrimination. When employers are denied the tools they need to fight discrimination, both institutional and intentional, within their workplaces, all workers suffer. NELP is concerned with eradicating all forms of illegal discrimination and providing employers, workers and their advocates all tools available to remedy and eliminate invidious discrimination.

The *National Organization for Women Foundation* is a 501 (C) (3) entity, founded in 1987, to further the rights of women through education and litigation. It is affiliated with the National Organization for Women which is the nation's largest feminist activist organization, with chapters in every major city and in all 50 states and in Washington, D.C. Since its founding in 1966, NOW has been committed to the full enforcement of both Title VII and the Equal Protection Clause, and has engaged in litigation in furtherance of their enforcement.

The *Northwest Women's Law Center* (NWWLC) is a non-profit public interest legal organization that works to advance the legal rights of women in the Pacific Northwest through litigation, education, legislative advocacy, and the provision of legal information and referral services. Since its founding in 1978, the NWWLC has been dedicated to protecting and securing equal rights for women and their families, including in the workplace, in educational institutions, and elsewhere. Toward that end, the NWWLC has participated as counsel and as amicus curiae in cases throughout the Northwest and the country, including numerous cases establishing women's rights to work

free from sex discrimination and sexual harassment. The Law Center continues to serve as a regional expert and leading advocate in litigation and in legislative efforts to protect equal opportunity in the workplace.

Oregon Tradeswomen, Inc. works to promote the success of women in the trades by training women for apprenticeship, supporting current tradeswomen and educating the next generation. We are interested in assuring that government has all tools available to remedy discrimination, particularly in areas where there has been occupational segregation by gender.

The *Sargent Shriver National Center on Poverty Law* (Shriver Center) champions economic opportunity through fair laws and policies so that people can move out of poverty permanently. Our methods blend advocacy, communication, and strategic leadership on issues affecting people living in poverty. National in scope, the Shriver Center's work extends from the Beltway to state capitols and into communities building strategic alliances. Through its Women's Law and Policy Project, the Shriver Center works on issues related to women's employment and economic security. Discriminatory workplace policies and practices have a negative impact on women's immediate and long-term economic security. Non-discrimination in employment is the surest path out of poverty and toward economic well-being. The Shriver Center has a strong interest in the eradication of unfair and unjust employment policies and practices, including access to family-sustaining employment, which serve as a barrier to economic equity.

Sociologists for Women in Society is an organization of professional sociologists who are committed to improving the situation of women in the academy and in the broader society. Many of us do research documenting the existence of gender biases at work and identifying common mechanisms by which gender biases are intentionally and unintentionally perpetuated. We work to share the findings of this sociological research with students, colleagues, and members of our communities.

The *Southwest Women's Law Center* is a nonprofit women's legal advocacy organization based in Albuquerque, New Mexico. Its mission is to create the opportunity for women to realize their full economic and personal potential by eliminating gender discrimination, helping to lift women and their families out of poverty, and ensuring that women have control over their reproductive lives. The Southwest Women's Law Center is committed to eliminating gender discrimination in all of its forms and ensuring broad and meaningful enforcement of anti-discrimination laws and constitutional prohibitions on sex discrimination.

The *Women & Politics Institute at American University* is dedicated to the educational advancement of young women to prepare them for positions of leadership in the economic sphere. The Institute offers more courses on women's issues than any other university in the United States and offers a specialized certificate in Women, Policy, and Political Leadership. As such, the Institute is very concerned with opportunities for women in the workplace. The use of discriminatory tests limits women's access to a number of professions

and would reverse decades of progress toward equality in the workforce.

Women Employed is a national organization based in Chicago whose mission is to improve the economic status of women and remove barriers to economic equity. Since 1973, the organization has fought to outlaw pay discrimination, pregnancy discrimination and sexual harassment and to strengthen federal equal opportunity policies and work/family benefits. Women Employed strongly supports the ability of employers to take steps to rectify discriminatory policies and practices against women.

The *Women's Law Project* (WLP) is a non-profit public interest law firm with offices in Philadelphia and Pittsburgh, Pennsylvania. Founded in 1974, the WLP works to abolish discrimination and injustice and to advance the legal and economic status of women and their families through litigation, public policy development, public education and individual counseling. Throughout its history, the WLP has worked to eliminate sex discrimination, bringing and supporting litigation challenging discriminatory practices prohibited by federal civil rights laws. The WLP has a strong interest in the proper application of civil rights laws to provide appropriate and necessary redress to individuals victimized by discrimination.

The *Women's Sports Foundation* is a 501(c)3 nonprofit educational organization dedicated to advancing the lives of girls and women through sports and physical activity and ensuring equal participation and leadership opportunities for girls and women in sports and fitness. The Foundation distributes over 2 million

pieces of educational information each year, awards grants and scholarships to female athletes and girls' sports programs, answers over 100,000 inquiries a year concerning Title IX and women's sports issues, and administers awards programs to increase public awareness about the achievements of women in sports.

Nos. 07-1428, 08-328

In the Supreme Court of the United States

FRANK RICCI, ET AL., *Petitioners*
v.
JOHN DESTEFANO, ET AL., *Respondents*

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR
THE NEW YORK LAW SCHOOL
RACIAL JUSTICE PROJECT
AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

The New York Law School Racial Justice Project ("the Racial Justice Project") is a legal advocacy organization sponsored by New York Law School that is dedicated to protecting constitutional and civil rights. The Racial Justice Project seeks to increase public awareness of racism, racial injustice, and structural racial inequality in the areas of education, employment, political participation, and criminal justice. To accomplish its mission, the Racial Justice Project engages in litigation, training, and public education and other forms of advocacy that seek to ensure equal access and opportunity. The Racial Justice Project has a continued interest in the development of jurisprudence that guards against racial discrimination and that promotes a positive legal framework for addressing matters of civil and constitutional rights. Accordingly, the Racial Justice Project has a substantial interest in the outcome of this litigation.

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[1] The parties have filed blanket written consents to the filing of *amicus* briefs in this case. This brief was not authored in whole or in part by a party or counsel for a party, and no person or entity, other than *amicus curiae*, its members, and its counsel, made a monetary contribution to the preparation and submission of this brief.

INTRODUCTION

The overly rigid interpretation of Equal Protection doctrine advanced by Petitioners runs counter to the letter, spirit, and logic of the Court's well-established law in this area. Petitioners go too far to the extent they invite the Court to apply strict scrutiny to state policies that may be race-conscious in their objective, but are clearly race-neutral in their application. A ruling to such effect by the Court not only has the potential to seriously erode Title VII's promise of eliminating structural barriers to employment opportunity for racial minorities, but also would cast doubt on an array of governmental policies and programs that are similarly structured around the goals of promoting a more racially inclusive society.

SUMMARY OF THE ARGUMENT

At issue in this case are the reasonable efforts of a local government to constitutionally navigate Title VII's laudable goal of eliminating racial segregation in the workforce, 42 U.S.C. § 2000e-2(a)(2), the faithful implementation of which necessarily requires some background consideration of race. In carrying out this goal, the City of New Haven [hereinafter "the City"] declined to certify a test used to assess firefighters for promotion based on its reasonable belief that such test was invalid

under Title VII's disparate impact standard.[2] Nothing in the Supreme Court's Equal Protection jurisprudence commands the application of strict scrutiny to a state actor's race-conscious decision to disband use of a governmental process that reasonably appears to violate federal law. *Cf. Bush v. Vera*, 517 U.S. 952, 958 (1996) ("Strict scrutiny does not apply merely because redistricting is performed with consciousness of race."). Nor is strict scrutiny an appropriate standard of review given that the City was in the middle of its selection process, having just returned to the drawing board to determine how best to proceed following the Civil Service Board's split vote and non-certification of the test results.

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[2] After becoming aware of a stark racial disparity in the results of its 2003 firefighter promotion examination, the City referred the issue of the promotions and use of the test to the Civil Service Board [hereinafter "the Board"], an independent body charged with administering the City's civil service system, including the certification of the results of competitive examinations. J.A. 221–22. It is the Board, and not City officials, that make all final decisions regarding the use of the examination results. Respondent's Brief on the Merits 6 [hereinafter Resp't Br.]. Over a two-month period, the Board held five hearings at which members of the public, testing experts, and Thomas Ude, Corporation Counsel for the City, testified. Following the hearings, the Board split two to two; and the test results were not certified. Resp't Br. 10.

ARGUMENT[3]

I. The Court Has Never Held That Race-Neutral State Policies That Are Adopted for the Purpose of Alleviating Structural Racial Inequality Are Subject to Strict Scrutiny, Much Less That Such Policies Are Unconstitutional.[4]

The Court has consistently emphasized that its primary Equal Protection concern in the race context lies with state policies that explicitly and systematically classify individuals on the basis of race as part of an "adjudicatory"[5] process for determining the distribution of governmental services or benefits; as a "predominant factor" in

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[3] The order of arguments in the Petitioners' Brief implies that the Court should consider the constitutionality of the City's actions first, before addressing the matter under Title VII. *See* Petitioners' Brief. i (Questions Presented) [hereinafter Pet'rs Br.]. If so, Petitioners advance a novel theory that infringes the well-established "canon of constitutional avoidance." *See Bartlett v. Strickland*, 07-689, 2009 WL 578634, at *2 (U.S. Mar. 9, 2009). The appropriate course is for the Court first to analyze the City's actions under Title VII and then, only if it concludes that there is no Title VII violation, to proceed to the Petitioners' constitutional argument.

[4] Amicus incorporates by reference all of Respondents' arguments, and merely writes separately to emphasize that strict scrutiny is not an appropriate standard of review either in this case or in any other cases that might address the constitutionality of government policies that espouse race-conscious objectives, but are race-neutral in their application.

[5] *See* Andrew M. Carlon, *Racial Adjudication*, 2007 BYU L. REV. 1151, 1183 (2007).

electoral districting; expressly to segregate on account of race; or for the invidious purpose of burdening individuals due to racial animus, prejudice, or hostility. *See, e.g.*, *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 127 S. Ct. 2738 (2007) (K–12 school assignment); *Miller-El v. Dretke*, 545 U.S. 231 (2005) (race-based peremptory strikes in criminal jury selection); *Johnson v. California*, 543 U.S. 499 (2005) (policy of segregating prisoners on basis of race); *Grutter v. Bollinger*, 539 U.S. 306 (2003) (law school admissions); *Gratz v. Bollinger*, 539 U.S. 244 (2003) (undergraduate admissions); *Rice v. Cayetano*, 528 U.S. 495 (2000) (voting privileges for state office); *Adarand v. Pena*, 515 U.S. 200 (1995) (federally-funded contracts); *Shaw v. Reno*, 509 U.S. 630 (1993) (congressional redistricting); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 630–31 (1991) (race-based peremptory strikes in civil trial may rest on racial stereotypes, "open hostility or from some hidden and unarticulated fear"); *City of Richmond v. Croson*, 488 U.S. 469 (1989) (locally-funded contracts); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (collective bargaining agreement that extended "preferential protection" to minorities against layoffs); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (race-based school assignment to perpetuate racial segregation).

Petitioners go too far, therefore, to the extent they invite the Court to apply strict scrutiny to *any* governmental action that relies at some aggregate level on race-conscious policy. Carried to its logical conclusion, this overly restrictive and inflexible treatment of race would unnecessarily discourage

state actors from taking voluntary, facially neutral steps to address structural racial inequality in employment—an outcome neither required by Equal Protection doctrine nor supported by its logic. *Cf. Parents Involved*, 551 U.S. at ___, 127 S. Ct. at 2792 (Kennedy, J., concurring in part and concurring in the judgment) (rejecting plurality's rigid "colorblind" approach and concluding that schools are "free to devise race-conscious measures to address the problem [of racial isolation] in a general way" without fear of triggering strict scrutiny). Notwithstanding the admonition that strict scrutiny is not "fatal in fact," *Adarand*, 515 U.S. at 237 (plurality opinion), the application of such a standard would have the practical effect of casting doubt on an array of governmental programs and practices, including some that a solid majority of the Court has suggested would pass constitutional muster. *Parents Involved*, 551 U.S. at ___, 127 S. Ct at 2793 (Kennedy, J., concurring in part and concurring in the judgment); *Croson*, 488 U.S. at 521 (Scalia, J., concurring in the judgment); *see infra* Pt. I.B.

A. Petitioners Distort the Court's Equal Protection Jurisprudence to the Extent They Conflate Governmental Action That Systematically Advantages Racial Minorities with General Race-Conscious Policymaking.

Petitioners argue that the decision by the City not to certify the results of the 2003 promotion examination was "motivated by race, relying solely

on racial-distribution information about the candidates, and with a starkly disparate racial harm," and therefore should be subject to strict scrutiny under the Equal Protection Clause. *See* Pet'rs Br. 24. As the basis for their assertion, Petitioners attempt to cobble together a series of "race-based actions" purportedly taken by the City. *See* Pet'rs Br. 10, 26. These include the City's (acknowledged) consideration of the adverse racial impact of the test on minority candidates as a group, achieved by race-coding the results of the civil service exam; its subsequent non-certification of the test results to avoid liability under Title VII; and the supposed influence that Reverend Kimber, a local African-American minister, had during the City's deliberative process before the Civil Service Board. *See* Pet'rs Br. 11, 30.[6]

None of these actions in any way qualifies as a racial "classification" or "preference" for purposes of heightened constitutional review.[7] In so asserting,

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[6] Petitioners also assert that the City's expressed concern about liability under Title VII was in fact a conspiratorial cover for its efforts to engage in "racial politics" with Reverend Kimber. Pet'rs Br. 30–31. Putting to one side the accuracy of this claim and whether there is any genuine factual support for it in the record, nothing in Equal Protection doctrine remotely requires a state actor to disregard a politically active constituent merely because of his efforts on behalf of a racially identifiable community. *Cf. Hunt v. Cromartie*, 526 U.S. 548, 551 (1999) (observing that state reapportionment scheme that is drawn with an awareness of the alignment between political affiliation and race is still likely to pass constitutional muster).

[7] To the extent that Petitioners' argument rests on allegations of "disparate racial harm," the Court should utilize the standard of review established in *Vill. of Arlington Heights*

Petitioners conflate two distinctly different kinds of racially contextualized state action, which this Court's longstanding Equal Protection jurisprudence has suggested warrant different levels of scrutiny. The first, which clearly triggers close review under well-established and more recent case law, involves an explicit state policy or practice of systematically identifying individuals by race in the course of assigning or allocating a governmental benefit to some individual(s) within that group,[8] *see, e.g.*, *Grutter*, 539 U.S. 306; *Gratz*, 539 U.S. 244; *Adarand*, 515 U.S. 200; *Croson*, 488 U.S. 469, or in the course of performing some governmental function that plainly segregates individuals on the basis of race, *see Johnson*, 543 U.S. 499 (policy of racial segregation in prisons); *Shaw*, 509 U.S. 630 (redistricting where race is a "predominant factor"). Thus, the Court has determined that strict scrutiny applies to "benign" state classifications by race, *see, e.g.*, *Grutter*, 539 U.S. at 326; *Adarand*, 515 U.S. at 227, while notably concluding that such classifications may survive more rigorous judicial review. *Grutter*, 539 U.S. at 326; *cf. Adarand*, 515

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v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977); *see also Washington v. Davis*, 426 U.S. 229 (1976). The City's argument is entirely consistent with the framework set forth by the Court in *Arlington Heights*. While the Court has been careful to observe that "ostensibly neutral" classifications are presumptively invalid where they are an "obvious pretext for racial discrimination," *Pers. Adm'r v. Feeney*, 442 U.S. 256, 272 (1979), *Arlington Heights* counsels that identifying a governmental "discriminatory purpose"—rather than the state's consideration of race *per se*—lies at the heart of the Court's Equal Protection analysis. *See* 429 U.S. at 264–65.

[8] *See* Carlon, *supra* note 5, at 1159–60.

U.S. at 237 (observing that "[s]trict scrutiny is not 'strict in theory, but fatal in fact'").

The second kind of state action—the type implicated by the City's efforts to avoid Title VII liability—involves general race-conscious policymaking that should not trigger strict scrutiny. For example, although Justice Kennedy in *Parents Involved* rejected blunt uses of race to assign students to different public schools, he plainly endorsed the overarching race-conscious goal of reducing racial isolation and/or promoting student body diversity in K–12 education, suggesting in the strongest possible terms that "general" policies used to carry out these goals would not invite strict scrutiny. *See Parents Involved*, 551 U.S. at ___, 127 S. Ct. at 2792 (Kennedy, J., concurring in part and concurring in the judgment).[9] In the voting context, at least five current members of the Court have similarly endorsed the limited use of race for redistricting, in order to "ensure that citizens of all races have equal opportunity to share and participate in our democratic processes and traditions." *Bartlett*, 2009 WL 578634, at *16; *see also Parents Involved*, 551 U.S. at ___, 127 S. Ct. at 2792 (Kennedy, J., concurring in part and concurring in the judgment) (quoting with approval *Vera*, 517 U.S. at 958 (plurality opinion) ("Strict scrutiny does not apply merely because redistricting is performed with consciousness of race. . . . Electoral district lines

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[9] Moreover, a fair reading of the dissenting opinions in *Parents Involved* strongly suggests that at least four other members of the Court would support Justice Kennedy's view. *See Parents Involved*, 551 U.S. at ___, 127 S. Ct. at 2800–37 (Breyer, J., dissenting).

are 'facially race neutral' so a more searching inquiry is necessary before strict scrutiny can be found applicable in redistricting cases than in cases of 'classifications based explicitly on race.'")); *Easley v. Cromartie*, 532 U.S. 234, 241 (2001) (race may be "'*a* motivation for the drawing of a majority-minority district,'" provided it is not the "'*predominant* factor' motivating the legislature's districting decision") (quoting *Vera*, 517 U.S. at 959 (plurality opinion)). In this respect, the City's consideration of race to avoid adverse racial impact under Title VII—and its concomitant identification of promotion candidates by race for purposes of that analysis—is analogous to a state's race-conscious efforts to avoid liability under the Voting Rights Act. Both kinds of state action implicate race-conscious objectives, but at an aggregate level and in a manner that does not immediately burden or disadvantage particular individuals. Properly understood, these cases indicate that the Court does not reflexively apply strict scrutiny simply because race is somehow present in a governmental process.

Thus, while Petitioners allege that the proceedings before the Civil Service Board constitute the kind of "race-based action" that the Court has determined necessarily triggers strict scrutiny under the first category of state action, a fairer reading suggests that the Board's deliberations fall within the second category. The deliberations may to some extent have been race-conscious in that they sought to comply with Title VII, but they are distinctly race-

neutral in that they did not award or deny individual employment on the basis of race.[10]

For this reason, the Petitioners' reliance on *Adarand* and *Croson* is misplaced. *See* Pet'rs Br. 23–26. Unlike the facts of this case, both *Adarand* and *Croson* involved the constitutionality of programs that facially and systematically conferred a presumptive advantage on racial minorities. In *Adarand*, the Court concluded that strict scrutiny applied to a federal program that gave a presumptive preference to minority business entities. 515 U.S. at 206–07. The Court in *Croson* applied strict scrutiny to strike down a minority business enterprise program that required prime contractors on city projects to subcontract a fixed percentage of the contract amount explicitly on the basis of race. 488 U.S. at 477–78. The *Croson* program thus facially employed racial quotas and, like the program at issue in *Adarand*, actually awarded contracts to racially-identified "minority" businesses on the basis of such state classifications. Neither *Croson* nor *Adarand*, therefore, stands for the broad proposition advanced by Petitioners here—that a governmental actor's *general* consideration of race necessarily warrants heightened judicial review when it seeks to comply with a (perhaps arguably)

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[10] For reasons discussed below, *see infra* Pt. II.A, it would be premature to apply strict scrutiny at this stage of the City's selection process when it was still deliberating about how to appropriately respond to the promotion examination's disparate impact and concerns raised regarding the test's validity.

race-conscious federal mandate but does so using means that are not individually, racially targeted.[11]

B. Petitioners' Overly Restrictive Interpretation of Equal Protection Doctrine Could Threaten a Wide Range of Measures That Are Facially Race-Neutral in Their Application.

The application of strict scrutiny in the manner urged by Petitioners has the potential to jeopardize numerous measures employed by various state actors that are race-conscious in their objectives but are neutrally applied, including some measures that members of this Court have previously endorsed.

State and local governments have increasingly employed facially race-neutral measures to achieve greater minority inclusion and participation. For example, the Texas Legislature passed House Bill

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[11] Moreover, all candidates for the City's firefighter exam took the same test and were subject to the same scoring system and screening process. *Cf. Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 272–76 (1978) (using strict scrutiny to strike down a school admission program that used one process for minorities and another for all other applicants). Although Petitioners claim that they were denied promotions that they were otherwise "entitled" to under state law because of their race, their claim rests on the unfounded assumption that the test upon which they stake their entitlement was in fact a valid assessment tool. The district court correctly concluded that Petitioners had raised no triable factual issue that the City's concern about the test's validity was pretextual. *Ricci v. DeStefano*, 530 F.3d 88, 89 (2d Cir. 2008) (denial of petition for rehearing en banc)

588, the "Ten Percent Plan," partly in an effort to increase minority enrollment. *See* TEX. EDUC. CODE ANN. § 51.803(a) (Vernon 2007). Similarly, the University of California Board of Regents voted to guarantee the top four percent of students from every state high school admission into a state university. *See* THE REGENTS OF THE UNIV. OF CAL., POLICY ON UNDERGRADUATE ADMISSIONS REQUIREMENTS (2009). Florida has adopted a similar policy, The One Florida Equity in Contracting Initiative. *See* Fla. Exec. Order No. 99-281 (granting admission in the state university system to anyone graduating in the top 20% of their class in any of the state's high schools). Although the "percentage plans" are motivated at least in part by a desire to improve the station of racial minorities, the Court has implicitly endorsed the use of such measures as "race neutral." *See Grutter*, 539 U.S. at 339 (describing the percentage plans as a "race-neutral" alternative); *cf. Am. Civil Rights Found. v. Berkeley Unified Sch. Dist.*, 2009 WL 678992 (Cal. Ct. App. 1 Dist.) (finding that use of neighborhood demographics to carry out school assignment for purposes of creating racial and socioeconomic diversity does not violate the California Constitution provision barring "preferential treatment" on the basis of race).

Neither the letter nor spirit of Equal Protection doctrine suggests that any of the measures described above are unconstitutional. To the contrary, a solid Court majority has often encouraged the use of race-neutral means to achieve the justifiably race-conscious objectives of greater

minority inclusion and participation.[12] *Parents Involved*, 551 U.S. at ___, 127 S. Ct. at 2792 (Kennedy, J., concurring in part and concurring in the judgment) ("School boards may pursue the goal of bringing together students of diverse backgrounds and races through other means" including strategic selection of locations, drawing of attendance zones, special programs, and targeted recruiting with a recognition of demographics). Indeed, even members of the Court who in the past have explicitly rejected any use of race to confer or deny *individual* benefits have nevertheless acknowledged the continuing importance of overarching race-conscious measures to dismantle structural barriers to opportunity for racial minority groups. *See, e.g.*, *Croson*, 488 U.S. at 526 (Scalia, J., concurring in the judgment) ("A state can, of course, act to 'undo the effects of past discrimination' in many permissible ways that do not involve classification by race."). Lower courts have also sanctioned the consideration of race-neutral policies to promote goals that are explicitly race-conscious. *See, e.g.*, *Johnson v. Bd. of Regents of the Univ. of Ga.*, 263 F.3d 1234, 1259 (11th Cir. 2001) ("guaranteeing admission to the top percentage of graduating seniors in every high school in the state" may serve as an "innovative strateg[y]" to create a more diverse student body); *Tuttle v. Arlington County Sch. Bd.*, 195 F.3d 698, 706 (4th Cir. 1999) (noting that three "race-neutral alternatives demonstrate[d] that the school Board ha[d] race-

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[12] Accordingly, Petitioners' contention that the City must first establish a Title VII violation against itself prior to taking steps to avoid a racially disparate impact, *see* Pet'rs Br. 58, is simply wrong.

neutral means to promote diversity"). A contrary ruling by the Court that adopts Petitioners' aggressive doctrinal view, therefore, would destabilize settled social expectations about the appropriate means for policing the boundaries between individual rights and laudable state efforts that justifiably seek to promote racial inclusion. *Cf. Planned Parenthood v. Casey*, 505 U.S. 833, 854–55 (1992) (describing the importance of taking into account the country's social practices and reliance interests).

II. The Court Should Not Reformulate Equal Protection Law in a Manner That Impedes the Efforts of Public Employers to Take Voluntary, Race-Neutral Steps to Comply with Title VII.

While this Court has long held that Equal Protection analysis does not depend on the race of those benefited or burdened by a particular classification, *see, e.g.*, *Croson*, 488 U.S. at 494, none of this Court's prior Equal Protection cases mandates the application of strict scrutiny in this unique employment context, involving the defensive consideration of race at the policy level in order to avoid the specter of federal liability under Title VII.[13] The Court should reject Petitioners' call to

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[13] A broad decision by the Court to apply strict scrutiny here could jeopardize the ability of governmental entities to comply with analogous race-conscious federal statutes and regulations in other contexts. *See, e.g.*, Fair Housing Act, 42 U.S.C. § 3601 *et seq.* (2000) (prohibiting housing practices that produce racially disparate impact); *see also* Voting Rights Act of 1965 § 2, 42 U.S.C. § 1973(a) (2000) (prohibiting practices

reformulate Equal Protection doctrine in a manner that would frustrate voluntary efforts by state actors to address persistent racial disparities in employment. Moreover, the application of strict scrutiny at this interim stage in the City's selection process—just as it was returning to the drawing board to determine what it should do—is not required to advance the goals of the Fourteenth Amendment and would be unnecessarily disruptive to the City's efforts to craft an appropriate resolution to this problem.[14]

"which result[] in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color"); No Child Left Behind Act of 2001, 20 U.S.C. § 6311(b)(2)(C)(v) (2000) (requiring states to track the educational achievement of racial and ethnic groups); 34 C.F.R. § 100.3(b)(6)(ii) (2009) (authorizing program recipients of federal funding to take affirmative action to overcome racial inequalities, even in the absence of prior discrimination, pursuant to Title VI of the Civil Rights Act of 1964).

[14] Such a determination could also cast doubt on this Court's jurisprudence in the area of sex-based classifications. The Court has upheld sex-based classifications to remedy the "manifest imbalance" in the workforce. *See Johnson v. Transp. Agency*, 480 U.S. 616 (1987); *cf. Heckler v. Mathews*, 465 U.S. 728 (1984) (rejecting constitutional challenge to statute that offsets the pensions of husbands, but not wives). Petitioners' suggested construction of Equal Protection doctrine could, therefore, limit employers' ability to engage in sex-conscious actions to comply with federal anti-discrimination statutes, leaving them exposed to litigation. *See* Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(h) (2000) (prohibiting employment discrimination based on sex); Equal Pay Act of 1963, 29 U.S.C. § 206(d) (2000) (prohibiting employers from paying male and female employees working on comparable jobs different wages solely based on an employee's sex); *see also* Title IX of the Civil Rights Act of 1964, 20 U.S.C. § 1681(a) (2000) ("No person in the United States shall, on the basis of

A. It Would Be Premature to Apply Strict Scrutiny Now, Given That the City Is in the Middle of Its Selection Process and Was Still Exploring Its Options Following the Civil Service Board's Non-Certification of the Test Results When Petitioners Filed Suit.

Petitioners' assertion that strict scrutiny applies to the City's decision to decline certification of the test—leading, in their view, to lost promotion opportunities—rests on the unwarranted assumption that the City had actually concluded the selection process.[15] In reality, the City was still sorting out its options when Petitioners filed this suit.[16] Petitioners, therefore, seek to bypass the City's process and instead seek through litigation to force a resolution in their immediate favor.[17] Strict scrutiny at this stage might be warranted were there a triable factual question of whether the City had proceeded in a reasonable, deliberative, and

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sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education [assistance] program or activity receiving Federal financial assistance . . ."). Thus, such a determination will also pit sex-based curative measures, essential to conformity with federal statutes, against the Equal Protection Clause, all the while frustrating the purpose of both.

[15] The other unwarranted assumption is that Petitioners were entitled as a matter of law to the promotions, which of course is one of the core questions being addressed in this case. *See* Pet'rs Br. i (Questions Presented).

[16] *See* Resp't Br. 1.

[17] The City also had to contend with the possibility that a decision to proceed with the certification would have invited a challenge to its test based on disparate impact, placing it in the sensitive position of having to navigate conflicting legal claims.

transparent fashion. *Cf. Parents Involved*, 551 U.S. at ___, 127 S. Ct at 2789–90 (Kennedy, J., concurring in part and concurring in the judgment) (objecting to lack of transparency in school assignment policy). But such is not the case here. The Civil Service Board's decision not to certify resulted from an extensive process involving five hearings over the course of two months, including public and expert testimony both from those who supported and opposed certification.[18] The City plainly was acting conscientiously in its efforts to reach a fair, just, and lawful result.

Thus, the application of strict scrutiny now would be premature. To find otherwise would trap governmental actors between the proverbial rock and a hard place, caught between a constitutional standard of heightened judicial review—never intended to apply in circumstances like these—and a federal law that is appropriately designed to eliminate segregation in the workplace. If public actors are to carry out this mandate, they must be provided some reasonable room to maneuver without fear that they will be hauled into court merely for considering the overarching impact of race before they have even finished their selection process.[19] Indeed, Justice Kennedy expressed this very concern in his concurrence in *Parents Involved*:

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[18] *See* Resp't Br. 1, 6 (describing evidence before the Civil Service Board concerning the test's lack of validity).

[19] This is not to suggest that the City could repeatedly rewrite its test or infinitely extend its selection process without inviting heightened judicial review. However, because these facts do not present themselves in this case, the Court need not address this question.

> Executive and legislative branches, which for generations now have considered [race-conscious] policies and procedures, should be permitted to employ them with candor and with confidence that a constitutional violation does not occur whenever a decisionmaker considers the impact a given approach might have on students of different races.

551 U.S. at ___, 127 S. Ct. at 2792 (Kennedy, J., concurring in part and concurring in the judgment). This concern applies with equal force here where the City, having begun the process of identifying its options, should be permitted reasonable time and space to bring it to a close.

B. The Inflexible Interpretation of Equal Protection Doctrine Advanced by Petitioners Would Hamper the Efforts of Public Employers to Comply with Title VII, Thereby Undermining the "Legitimate Interest Government Has in Ensuring [That] All People Have Equal Opportunity Regardless of Their Race."[20]

Petitioners' stringent interpretation of Equal Protection doctrine has the potential to severely impede the responsible implementation of Title VII's mandate. The disparate impact provisions of Title VII prohibit employment practices that have a

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[20] *Parents Involved*, 551 U.S. at ___, 127 S. Ct. at. 2791 (Kennedy, J., concurring in part and concurring in the judgment).

disparate impact "because of . . . race" or on the "basis of race." 42 U.S.C. 2000e-2(a)(2), (k)(1)(A)(i). The race-conscious nature of this prohibition necessarily requires an employer to be aware of the race of individual applicants when adopting selection procedures and, in fact, to consider race if the selection procedure ultimately results in a racially disparate impact. To this end, public employers must necessarily be permitted to gather, consider, and act upon racial data in order to avoid, to the extent legally feasible, any disparate impact unjustifiably resulting from their employment practices.[21] Hampering the efforts of public

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[21] In enacting Title VII, Congress envisioned cooperative remedial and conciliatory efforts on the part of employers in ensuring equal employment opportunities for minorities and women. *The Civil Rights Act of 1990: J Hearings on H.R. 4000 Before the Comm. on Education and Labor and the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 101st Cong., 1st Sess. (1990) (statement of Rep. Gunderson), *reprinted in* 5 BERNARD D. REAMS JR. & FAYE COUTURE, THE CIVIL RIGHTS ACT OF 1991: A LEGISLATIVE HISTORY OF PUBLIC LAW 102-166, at 181 (1994). Congress expressly noted that "emphasis is laid on remedial state action or voluntary action before the forces of the federal government are called into play." 88 CONG. REC. 14,219 (1964). The legislature envisioned a measure of participation from state actors both formal and informal to "combat the dark shadow cast by discrimination." *The Civil Rights Act of 1990: J. Hearings on H.R. 4000 Before the Comm. on Education and Labor and the Subcomm. on Civil and Constitutional Rights of the H. Comm. of the Judiciary*, 101st Cong., 1st Sess. (1990) (statement of Rep. Edwards), *reprinted in* 4 BERNARD D. REAMS JR. & FAYE COUTURE, THE CIVIL RIGHTS ACT OF 1991: A LEGISLATIVE HISTORY OF PUBLIC LAW 102-166, at 19 (1994). A reading of Title VII that would require the certification of civil service examinations despite an apparent adverse impact is contrary to this purpose. *See also Faragher v. City of Boca*

employers in this regard will undercut Title VII's core objective of creating a more racially inclusive workforce.

CONCLUSION

For the foregoing reasons, the judgment of the Second Circuit should be affirmed.

Respectfully Submitted,

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MARCH 2009

Raton, 524 U.S. 775, 806 (1998); *Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 515 (1986) ("We have on numerous occasions recognized that Congress intended voluntary compliance to be the preferred means of achieving the objectives of Title VII.").

Supreme Court, U.S.
FILED
FEB 26 2009
OFFICE OF THE CLERK

No. 07-1428
VIDE 08-328

IN THE
Supreme Court of the United States

FRANK RICCI, ET AL.,
Petitioners,

v.

JOHN DESTEFANO, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICI CURIAE*, JOE OAKLEY, ET AL. IN SUPPORT OF PETITIONERS

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February 26, 2009

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QUESTION PRESENTED

Does a government employer, faced with evidence of adverse impact or disparate impact but no evidence of illegal discrimination, violate Title VII by rejecting the results of a competitive, content-valid, job-related promotional examination in an attempt to avoid Title VII litigation by unsuccessful participants who belong to protected classes?

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IDENTITY AND INTEREST OF AMICI CURIAE[1]

Amici curiae Joe Oakley, Doug Barnes, Jeffrey B. Polk, Michael Rallings, Mary Johnson, Ronald G. Fittes, Kurt Phillips, Anthony Rosser, Terry Landrum, Darrell L. Sheffield, Michael Williams, Michael J. Clark, William Volner, Jerry L. Gwyn, Howell Starnes, Joseph Scott, Gerald Blum, John Callahan Casad, Dale H. Simms, Russell G. Houston, III, Stephen Grisham, Kim C. Mansel, Robert Vaughn, Dennis Benjamin, Randy B. Oliver, Jerry W. Webb, Tracy Gossett, Susan K. Lowe, Gene Pevy, Dawn York, Gregory M. Quinn, James A. Richardson, Mary F. Newsom, Cornell Dye, Timothy E. Cook, Sr., Sandra D. Palmer, Jerry Bouchillon, Richard Borgers, Robert Shemwell and Scott Wilson (the "Oakley Petitioners") are Memphis Police Department officers whose pending petition for certiorari, *Oakley v. City of Memphis*, 08-744, raises issues identical to several of those in the instant case.

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[1] Counsel of record for all parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amici curiae*, their members or their counsel made a monetary contribution to its preparation or submission.

ARGUMENT

I. Ratifying The City of New Haven's Conduct Will Have Pernicious Effects on the Morale of a Variety of First Responder Forces, Including Law Enforcement Officers Such as Amici.

As law enforcement officers, amici curiae are charged with upholding and enforcing the law in their community–Memphis, Tennessee. Amici respectfully suggest that the Second Circuit has, in this case, failed to uphold and enforce the highest law of the land–the United States Constitution. As set forth powerfully in Petitioners' Brief:

> "[T]he Equal Protection Clause does not allow government actors to engage in intentional racial discrimination to avoid potential claims of unintentional racial discrimination. Even if there ever could be such a compelling interest, it could exist only if the government had strong evidence that unintentional discrimination had in fact occurred and not when, as in this case, there was little more than numerical disparity and indeed strong indications that the tests and their results would have survived any Title VII challenge."

(Petrs.' Brief at 28.) In cancelling a content-valid civil service promotions process solely because the test results indicated that not enough minority applicants qualified for promotions, the City of New Haven acted in a manner that the Equal Protection Clause, and this Court, simply cannot countenance. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 518 (1989)

(Kennedy, J., concurring in part and concurring in judgment) ("The moral imperative of racial neutrality is the driving force of the Equal Protection Clause."); *Washington v. Davis*, 426 U.S. 229, 239 (1976) ("The central purpose of the Equal Protection Clause . . . is the prevention of official conduct discriminating on the basis of race.").

The fact that the entity whose race-based decision-making has been laid bare before this Court is a local government and, worse still, that the promotional process that it derailed involved one of the most important functions that local government provides–first responder services–amplifies how important it is for this Court to rebuke the actions of the City of New Haven and declare that the desire to avoid being sued for unintentional discrimination does not justify intentional discrimination by government entities.

In addition to offending Equal Protection guarantees, the City of New Haven's cancellation of its promotions process also runs directly contrary to the core goal of Title VII–eliminating racial discrimination from employment decisions. *See Griggs v. Duke Power Co.*, 401 U.S. 424, 434 (1971) ("[T]he very purpose of Title VII is to promote hiring on the basis of job qualifications, rather than on the basis of race or color."). Just as the Equal Protection Clause cannot permit intentional racial discrimination under the guise of avoiding accusations of unintentional racial discrimination, amici agree with Petitioners that "avoiding Title VII disparate impact claims cannot justify intentional race-based disparate treatment." (Petrs.' Brief at 29.)

A pernicious ripple effect from the lower court decisions ratifying the City of New Haven's decision to cancel their promotional process has, in fact, already begun. Amici have their own pending petition for certiorari seeking review of a decision of the Sixth Circuit involving issues strikingly similar to the issues presented by Petitioners. *See Oakley v. City of Memphis,* No 08-744. In *Oakley*, the Sixth Circuit expressly acknowledged that the *Ricci* case was "factually analogous and persuasive authority" given that the results of the promotional tests in *Ricci* also ran afoul of the EEOC's four-fifths guideline. *Oakley v. City of Memphis*, No. 07-6274, 2008 WL 4144820 at * 5 (6th Cir., Sept. 8, 2008). The Sixth Circuit also quoted directly from the district court decision in *Ricci* to support an expressed analysis that effectively appears to be indistinguishable from a soft quota approach to hiring and promotion.

> [I]f promotions were made based on the exam results, the black-to-white selection ratio would fail the EEOC's "4/5ths Rule." No formal analysis is required to determine that, of the 115 test takers, 61 were black, 54 were white, and 24 were women; of the top 28 scorers, 21 were white, 7 were black, and 1 was female. Even if the MPD promoted the top 70 candidates, the race ration would fall 20% below the EEOC's 80% requirement.
>
> Appellants assert that the City should have performed "further analysis" before abandoning the promotional process. Neither Title VII nor agency guidelines require a formal finding of disparate impact. The law does not require an employer to validate or certify a process "where

> they cannot pinpoint its deficiency explaining its disparate impact under the four-fifths rule simply because they have not yet formulated a better selection method."

Id. at *3 (quoting *Ricci v. Destefano*, 554 F. Supp. 2d 142 (D. Conn. 2006), *aff'd*, 530 F.3d 88 (2d Cir. 2008)).

Amici, like Petitioners, are dedicated first responders who devoted significant time and effort, and made personal sacrifices, to prepare for and participate in a promotional process mandated by civil service requirements. Their efforts, like those of Petitioners, were ultimately futile because a municipal government believed it could make an intentional, race-based determination to cancel a content-valid promotions process using the EEOC guidelines as a shield. Condoning this type of conduct will, and does, result in institutional paralysis and mistrust within the ranks of those who would seek civil service promotions because it means that the certainty provided by the competitive process can evaporate for racial reasons. Political expediency and the fear of defensible future lawsuits cannot be a viable legal rationale for making promotional decisions on the basis of race in any governmental context, but most certainly not with respect to first responders. Seeing these scenarios play out with respect to promotional processes that affect the delivery of first responder services–those persons who like Petitioners, amici, and their colleagues throughout the country put their lives on the line every day to protect and serve their communities–only exacerbates the impact of such an untenable situation.

II. The Second Circuit's Ruling Endangers the Viability of the Merit-Based Civil Service System as a Protector of Government Integrity.

This Court has long recognized the widespread use and value of a merit-based civil service system. *See Rutan v. Republican Party of Illinois*, 497 U.S. 62, 79 (1990) (Scalia, J., dissenting) ("The merit principle for government employment is probably the most favored in modern America, having been widely adopted by civil service legislation at both the state and federal levels."); *see also United Pub. Workers of Am. (C.I.O.) v. Mitchell*, 330 U.S. 75, 121 (1947). According to this Court,

> [t]he civil service system has been called 'the one great political invention' of nineteenth century democracy. The intricacies of modern government, the important and manifold tasks it performs, the skill and expertise required, the vast discretionary powers vested in the various agencies, and the impact of their work on individual claimants as well as on the general welfare have made the integrity, devotion, and skill of the men and women who compose the system a matter of deep concern of many thoughtful people. . . . [T]hose who give continuity to administration, those who contribute the basic skill and efficiency to the daily work of government, and those on whom the new as well as the old administration is dependent for smooth functioning of the

> complicated machinery of modern government are the core of the civil service.

Mitchell, 330 U.S. at 121 (footnotes omitted).

Affirming the Second Circuit's ruling, however, would jeopardize the vitality of the merit-based civil service system enacted by the City of New Haven[2] and other cities alike. At all levels of government, a diluted merit-based civil service system will breed onerous consequences, including impairment of the government integrity that this Court has repeatedly sought to protect. *See, e.g.*, *Rutan*, 497 U.S. 62; *Branti v. Finkel*, 445 U.S. 507 (1980); *Elrod v. Burns*, 427 U.S. 347 (1979); *see also Rice v. Ohio Dep't of Transp.*, 14 F.3d 1133 (6th Cir. 1994). The ramifications of the Second Circuit's ruling–destabilization of merit-based civil service promotional systems impacting first responder forces–go beyond the onerous consequences that would be visited on other levels of governmental decision-making. Weakening a merit-based system for the sake of race-based and gender-based employment actions here will engender racial divide among first responders who, in order to be effective in fighting fires and saving lives, must perform as a trusting and cohesive group.

Although the Court's promotion of merit-based principles has largely been in the context of patronage policies, nevertheless, that application is relevant here. After all, it is beyond dispute that the making of

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[2] In order to ensure the smooth functioning of the machinery of its modern government, the Connecticut Supreme Court mandates compliance with civil service laws such as those enacted by the City of New Haven to further promotions on the basis of merit. *Kelly v. City of New Haven*, 881 A.2d 978, 1000 (Conn. 2005).

promotions and other hiring decisions on the basis of race and gender[3] is a more pernicious threat to constitutional principles than acts of political patronage.

III. By Reversing The Second Circuit's Ruling, This Court Can Prevent Onerous and Far Reaching Unintended Consequences That Would Flow From Permitting The Race-Based Decision Made By The City of New Haven.

The record in this matter is clear that the City of New Haven's decision triggering this litigation was based upon race. Each time the government is permitted to use racial criteria in its decision making, the very principles of equality upon which this nation was founded are placed at risk of further erosion. Here, the invalidation of content-valid promotional exams, based solely on the race of some of the applicants, is not only government action that will erode the fundamental principle of equality but will also have far reaching and onerous, unintended consequences on confidence in the civil service system and the morale of minority and non-minority government employees.

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[3] Although the Supreme Court has "consistently recognized that government bodies constitutionally may adopt racial classifications as a remedy for past discrimination," *Local 28 of Sheet Metal Workers Int'l Ass'n v. Equal Employment Opportunity Commission*, 478 U.S. 421, 480 (1986) (plurality opinion), in the instant matter, Respondents admitted they did not act to remedy past intentional discrimination. Pet.App. 938a-945a, 1013a-1037a.

One unintended consequence of ratifying the City of New Haven's actions will be the erosion of confidence in the civil service system. If local governments can treat the EEOC guidelines as essentially a soft quota, it will ensure that race will always be a prominent, and potentially overriding, factor in what are supposed to be merit-based promotional processes. If local governments can disregard the results of content-valid promotional exams based solely on a perception that not enough minority applicants will be promoted, then questions undermining the confidence that a true merit-based civil service system exists at all will always linger.

Yet another unintended consequence of decisions such as the City of New Haven's will be the demoralization of both minority and non-minority government employees. Amici, who are made up of Caucasians and African-Americans alike, are particularly concerned about the demoralizing impact that such race-based governmental decisions will have on the ability of first responders to work together to perform their vital government functions. The City of New Haven's disregard of the results of a promotional process proven to be content-valid will undermine and further stigmatize minority participants in the process as somehow requiring government intervention to secure their promotions. This type of decision-making based on race is a form of harmful discrimination in and of itself. *See Fullilove v. Lutznick*, 448 U.S. 448, 545 (1980) (Stevens, J., dissenting) (noting that "remedial" racial legislation "is perceived by many as resting on an assumption that those who are granted this special preference are less qualified in some respect that is identified purely by their race"). And, as for non-minority participants in the process, they

may come to believe that it is useless or unwise to compete for promotions because, despite their hard work in the application process, there exists a risk that even a process proven to be content-valid can simply be scuttled if the results are such that not enough minority participants will be promoted.

This Court has recognized that government employees need to rely on civil service merit processes to protect them from the vagaries of arbitrary political machinations. Government employees, and especially first responders, also need protection from improper considerations of race and gender. Civil service merit processes can provide that protection, but only if they are enforced and not so easily scuttled based simply on less than desirable results.

This Court certainly does not need amici to explain that a survey of reported federal cases nationwide paint a vivid picture of the corrosive effects that the use of race and gender considerations have when injected into what are intended to be neutral, content-valid civil service processes. The particular corrosive effect when the government pays scrupulous attention to the race and gender of employees making up first responder forces is visible not just from a survey of federal jurisprudence, but has even worked its way to some prevalence in popular culture. *See, e.g.*, Joseph Wambaugh, Hollywood Crows: A Novel (1st ed. 2008). The breakdown of police and fire departments into racial groups has not only furthered the very problems that Congress passed laws such as Title VII to prevent and repair, but also has engendered distrust and suspicion among first responder forces in ways that serve to erode the morale of those vital governmental employees.

Police and firefighters depend on their colleagues on society's front line and place their lives in each others hands every day. State and local governments, with the encouragement and under the protection of this Court, have instituted civil service procedures to insure that competence is rewarded and that promotions are based on merit, not politics. In a world in which the brave men and women who serve as firefighters in the City of New Haven, and other first responders, are so desperately needed by society, this Court must not condone governmental decisions that leave such first responders wondering whether they and their fellow officers have their positions because of merit or because of race.

CONCLUSION

The judgment of the Second Circuit on this important question endangers the delivery of emergency services throughout the nation and for that reason alone the Court should reverse the judgment below.

Respectfully submitted,

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Nos. 07-1428 & 08-328

IN THE

Supreme Court of the United States

FRANK RICCI, *ET AL.*

Petitioners,

v.

JOHN DeSTEFANO, *ET AL.*

Respondents.

On Writ of Certiorari to the United States Court of Appeals For The Second Circuit

AMICUS BRIEF OF THE OPPORTUNITY AGENDA IN SUPPORT OF RESPONDENTS

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INTERESTS OF AMICUS[1]

The Opportunity Agenda, a project of the Tides Center, is a communications, research, and advocacy organization with the mission of building the national will to expand opportunity in America. Among The Opportunity Agenda's core objectives is the elimination of barriers to equal employment opportunity irrespective of race, gender, nationality, socioeconomic status, or disability. The organization's recent activities have included research regarding unequal access to employment, credit, and other economic opportunities across the nation. The subject matter of this case is therefore of keen interest to the organization.

The Opportunity Agenda's parent organization, the Tides Center, is a not-for-profit, 26 U.S.C. § 501(c)(3) California corporation that provides core management and financial services as a fiscal sponsor to approximately 350 nonprofit program initiatives. The Tides Center actively promotes change toward the principles of social justice, broadly shared economic opportunity, fundamental respect for individual rights, the vitality of communities, and a celebration of diversity.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* represents that it authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amicus* or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief in the form of blanket consent letters filed with the Clerk.

SUMMARY OF ARGUMENT

Because much of this case has been couched in terms of "avoiding liability" or "good faith compliance" with the law, Pet. Br. 28, Resp. Br. 45, it is important to remember what the case is fundamentally about: the ability of employers, and particularly state and local governments proactively to ensure that their workforce selection procedures provide equal opportunity and are free from discrimination.

1. A. When an employer encounters evidence "on the ground" that its procedures may be discriminatory, it is faced with a choice: ignore the evidence and adopt the results of a possibly discriminatory process, or attend to that evidence by reexamining the process, exploring viable alternatives, and suspending a pending decision if necessary to avoid a biased outcome. The latter course is dictated not only by Title VII, but also by the responsibility, rooted in the Equal Protection Clause, to ensure equal opportunity for all.

Adopting Petitioners' interpretation of the law would be contrary to this Court's precedent, and would hobble a wide range of established and effective equal opportunity measures. For example, if a school district were to propose that new schools be sited in a particular location, and subsequently determine that the site would result in unnecessary racial concentration, this Court's case law would allow the school district to decline to go forward with the site plan while it considered other alternatives.

See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S.Ct. 2738 (2007).

Similarly, if a city commission consistently awards public contracts only to white contractors despite clear evidence that many equally qualified minority contractors exist and have bid for city contracts, a City Council that suspects the commissioners are engaging in *intentional* discrimination may suspend all contract approvals until a full investigation can be completed, and alternative procedures explored. *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 518 (1989).

B. The same principles clearly apply in the employment context. It is especially important now, in the 21st century, to assure that the law allows employers voluntarily to pause their hiring and promotion procedures, and look for better alternatives.

Our nation has made great progress in reducing and eliminating discrimination, but racial disparities remain pervasive, and discrimination has not been eradicated. Discrimination today is far less likely to announce itself overtly, but instances of covert, intentional discrimination remain and are routinely documented. Moreover, contemporary social science research has identified the extent to which discrimination is embedded within social institutions, and has further identified the unintentional, implicit biases that individuals hold as a part of human nature.

Covert bias, institutionalized bias, and implicit (unintentional) bias coalesce to cause the kinds of disparities that remain pervasive throughout American society. Evidence of these contemporary forms of unlawful discrimination is often found initially in the disparate racial outcomes themselves, and its more complex nature is especially likely to require investigation and assessment of procedures.

C. Consensus exists across governments that proactive responses to statistical evidence of discrimination are lawful and integral to protecting equal opportunity. That consensus is reflected in the international Convention on the Elimination of All Forms of Racial Discrimination, a treaty to which the United States and 173 of the world's other governments have agreed. And it is evident in the international embrace of the *Griggs* disparate impact standard. *See D.H. and Others v. Czech Republic*, 57325/00 Eur. Ct. H.R. (Nov. 13, 2007).

2. A. Importantly, although the Title VII doctrine is routinely referred to as "disparate impact," the disparate racial outcomes and impacts are not themselves unlawful. Rather, the disparate outcomes are "markers" an employer may properly interpret as signaling a need to scrutinize its selection procedures to assure that they are not unlawful, that they meets legitimate business needs, and that an effective, but less discriminatory alternative does not exist.

Contrary to petitioners' contention, Pet. Br. 44, reexamining and abandoning planned decisions

based on numerical evidence of discrimination and the prospect of less discriminatory alternatives is fully consistent with Title VII. Indeed, doing so fulfills Congress's preference for voluntary compliance with that statute, and this Court's emphasis on Title VII's role in eliminating "built-in headwinds" against advancement. *Griggs v. Duke Power*, 401 U.S. 424, 432 (1971).

Attending to these discriminatory outcomes does not warrant strict scrutiny under the Equal Protection Clause. Whereas strict scrutiny *is* triggered by certain uses of racial classifications to influence the ultimate racial *composition* of a workforce, student body, or field of contractors, the focus of Title VII and of the governmental decision in this case was on the fairness and legality of the *selection procedure*, irrespective of the racial distribution that it ultimately produces, and without assigning particular individual candidates to favored or disfavored groups.

B. Of course, where compliance with Title VII operates as a pretext for racial animus, both the enforcement mechanisms of Title VII and, in the case of public employers, the Equal Protection Clause act to check discriminatory conduct.

For all of these reasons, this Court should affirm the decision below.

ARGUMENT

I. INVESTIGATING AND RESPONDING TO DISPARATE OUTCOMES TO IDENTIFY POTENTIALLY DISCRIMINATORY PRACTICES IS ESSENTIAL TO ENSURING EQUAL OPPORTUNITY AND CONSISTENT WITH TITLE VII

Since the Civil Rights Act of 1964 was enacted, our nation has made remarkable progress in promoting equal opportunity and freedom from discrimination. Official segregation has been abolished, overt bias has receded, and the country has elected its first African-American President.

Yet abundant research and experience make clear that significant work remains, and that state and municipal governments have a crucial role to play in ensuring equal opportunity in employment, housing, and other sectors. *Cf. Bartlett v. Strickland*, No. 07-689, 556 U.S. ___, slip. op. at 21 (Mar. 9, 2009) (opinion of Kennedy, J.) ("[R]acial discrimination and racially polarized voting are not ancient history. Much remains to be done to ensure that citizens of all races have equal opportunity to share and participate in our democratic processes and traditions."). Fulfilling that role, moreover, necessitates that governments have the authority, and often the obligation, to investigate and root out discriminatory processes and mechanisms, as well as to identify and substitute less discriminatory alternatives. Doing so is part and parcel of, and

fully consistent with, Title VII strictures on governmental employers.

This Court's cases recognize the need for public employers to investigate and avoid potentially discriminatory practices by examining disparate outcomes to determine if they are unlawful, or if better alternatives are available. Doing so is particularly important to addressing the kind of covert, institutional, and implicit biases that are dominant today.

A. This Court's Cases Recognize the Government's Responsibility to Investigate and Respond to Evidence of Discriminatory Procedures

This Court has long held that governmental employers have the authority, and often the obligation, to investigate and respond when disparate outcomes suggest that discriminatory procedures may exist. It is crucial for employers to do so to address intentional discrimination under the Constitution and federal statutes, as well as processes with unintentional and unnecessary discriminatory effects in violation of Title VII's disparate impact standards.

1. Since at least 1886, in *Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886), the Court has recognized that the Fourteenth Amendment requires examining decisions that have a discriminatory effect to determine whether there is an underlying discriminatory motive, in violation of the Equal

Protection Clause. Facially neutral laws or policies can be "void by reason of [their] administration, operating unequally, so as to punish in [one] what is permitted to others as lawful." *Id.* at 369. Statistically unequal outcomes in the "actual operation" of decisionmaking criteria, the Court further found, *id.* at 373, are highly relevant—though not necessarily determinative—in identifying unlawful discrimination.

A long line of subsequent cases has noted that a facially neutral law can be applied in a discriminatory manner, and that racially disparate outcomes are compelling warning signs of discriminatory intent, warranting governmental attention. *See, e.g.*, *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977) ("Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of [a] state action."); *Washington v. Davis*, 426 U.S. 229, 241 (1976) ("[A] law's disproportionate impact is []relevant in cases involving Constitution-based claims of racial discrimination. A statute, otherwise neutral on its face, must not be applied so as invidiously to discriminate on the basis of race."); *Batson v. Kentucky*, 476 U.S. 79, 93 (1986) ("[P]roof of discriminatory impact may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds." (internal quotation marks omitted)).

Petitioners' contention that it is unlawful to halt a public hiring process in order to explore the cause of a disparate outcome and investigate the

existence of alternatives, Pet. Br. 54, 59, flies in the face of this established jurisprudence. Under petitioners' reading, a public employer would violate Title VII by responding to statistical evidence of discrimination in its own ranks as stark as the "inexorable zero" African-American drivers identified by the Court in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 342 n.23 (1977).

As Justice Kennedy recognized in his concurring opinion in *Croson*, "the State has the power to eradicate racial discrimination and its effects in both the public and private sectors, and the absolute duty to do so where those wrongs were caused intentionally by the State itself." 488 U.S. at 518. Nothing in the text or history of Title VII suggests an intent to disable state and municipal employers from fulfilling that role. Even absent the prospect of adverse litigation, municipalities have the power and often the duty to investigate and suspend decisionmaking processes in light of starkly discriminatory outcomes or other strong indicia of discrimination. It defies reason to suggest, as petitioners do, that Title VII was intended to thwart that governmental role.

2. To the contrary, Title VII requires employers to identify and respond to disparate outcomes, both to root out intentional discrimination, and to eliminate procedures that "operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability." *Griggs*, 401 U.S. at 432. If the congressional selection of "[c]ooperation and voluntary compliance

. . . as the preferred means for achieving" Title VII's goals means anything, *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974), employers must have the latitude to investigate and respond to significantly disparate outcomes to determine whether they are the result of unlawful selection processes.

The Court has repeatedly recognized the importance of attending to significant statistical disparities in identifying a pattern or practice of intentional discrimination under Title VII. *See, e.g.*, *Teamsters*, 431 U.S. at 339 ("Statistical analyses have served and will continue to serve an important role in cases in which the existence of discrimination is a disputed issue"; "Statistics are equally competent in proving employment discrimination." *citing Mayor of Phil. v. Educ. Equal. League*, 415 U.S. 605, 620 (1974) & *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 805 (1973)); *see also Croson*, 488 U.S. at 501 (gross statistical disparities may constitute prima facie proof of a pattern or practice of discrimination).

Moreover, Title VII's disparate impact provision, which are the basis for the voluntary compliance efforts at issue in this case focuses on scrutinizing employment practices that have unwarranted disparate impacts.

Title VII's disparate impact provision forbids an employer from utilizing "a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex or national origin" unless the employer can "demonstrate that the challenged practice is job related for the position in question

and consistent with business necessity." 42 U.S.C. § 2000-e2(k)(1)(A)(i). Even under those circumstances, the statute is violated if there exists an "alternative employment practice" with a lesser discriminatory effect, which the employer refuses to adopt. 42 U.S.C. § 2000-e2(k)(1)(A)(ii) & (C).

Petitioners are correct in stating that disparate impact and outcomes, without more, do not violate Title VII because it is well-established that Title VII does not provide for or turn on the ultimate racial outcomes. Pet. Br. 50; *see also Connecticut v. Teal*, 457 U.S. 440 (1982). But petitioners miss the essence of the Title VII disparate impact provision: disparate outcomes are a "marker," or "red flag" that something may be amiss, and properly trigger examination of the selection criteria. The legal term "disparate impact" is a shorthand to describe the circumstances that give rise to a need to scrutinize whether a particular employment practice unnecessarily and inappropriately deprives job applicants of equal opportunities.

Responsible voluntary compliance with Title VII requires employers to invest in reliable selection systems, but also to respond to conditions "on the ground." Especially where, as here, a test or other criterion is being used for the first time, an employer must be responsive to emerging evidence suggesting: (1) that the instrument has a discriminatory effect; (2) that it is not job-related for the position in question; (3) that it is not consistent with business necessity; and/or (4) that less discriminatory alternatives exist. At any of those junctures, a responsible employer should suspend, reexamine,

and possibly abandon its procedures—not simply to avoid liability, but to ensure that it is providing truly equal employment opportunity.

B. Attending to Disparate Outcomes is Especially Important in Addressing Contemporary Discrimination

As described above, adopting petitioners' interpretation of the law would contravene this Court's Title VII and Equal Protection precedents, and hobble a wide range of established and effective equal opportunity measures. These policies, and the authority to pursue them voluntarily, moreover, are especially important in the 21st century, when unlawful discrimination persists, but is most likely to be covert, institutional, or implicit in nature.

A large body of research and experience reveals that despite the progress we have made as a nation, racial bias and discrimination persist in employment and in other sectors. Importantly, however, these practices frequently take more sophisticated and less visible forms than at the time that Title VII was first enacted. While instances of overt and blatant racial discrimination still occur,[2]

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[2] Recent court cases reveal instances of postings of "no minorities" in on-line advertisements, *Chi. Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 668 (7th Cir. 2008) (postings for housing on Craigslist), and instances in which individuals were harassed with racial and religious epithets and subjected to "myriad and outrageous" discriminatory

discrimination in the 21st Century is more likely to be covert, implicit, or embedded in institutional structures.

These more subtle forms of intentional and unintentional bias nonetheless have a real and persistent effect, and frequently come to light in the first instance only by examining and attending to discriminatory effects. Because Congress proscribed "not only overt discrimination but also practices that are fair in form, but discriminatory in operation," *Teamsters*, 431 U.S. at 349 (quoting *Griggs*, 401 U.S. at 431), and sought "to assure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race," *Alexander*, 415 U.S. at 44, responding to racially disparate outcomes remains crucial to protecting employees from discrimination. Further, because "[c]ooperation and voluntary compliance were selected as the preferred means for achieving this goal," *id.*, public and private employers must have the latitude to investigate and respond to evidence of discriminatory outcomes.

Although modern social science research documents a substantial decrease in overt, self-reported racial animosity over the last several

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treatment, *Azimi v. Jordan's Meats, Inc.*, 456 F. 3rd 228, 232-33 (1st Cir. 2006). *See also Roberts v. Texaco*, 979 F. Supp. 185 (S.D.N.Y. 1997) (referencing taped conversations of senior corporate officials with racial bias).

decades,[3] there is overwhelming evidence of continued racial bias in employment and related contexts. Studies show that racial biases affect employment opportunity and hiring practices, as well as opportunity in housing, health care, lending, and a variety of other important aspects of everyday life. While not all of these biases are ultimately actionable under our civil rights laws, large categories do fall within their purview and, at least, warrant investigation and assessment by government actors. Moreover, as in this case, their presence makes it difficult for public and private employers to predict, ex-ante, the likelihood of disparate impact, thus highlighting the need for a flexible legal framework within which to react to evidence of bias.[4]

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[3] *See , e.g.*, PEW RESEARCH CENTER, OPTIMISM ABOUT BLACK PROGRESS DECLINES 1 (Nov. 13, 2007) (survey shows "that black and white Americans express very little overt racial animosity"); Devah Pager & Lincoln Quillian, *Walking the Talk? What Employers Say Versus What They Do*, 70 AM. SOCIOLOGICAL REV. 355 (June 2005); Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1506 n.76 (2005); PREJUDICE, DISCRIMINATION & RACISM 3-10 (John F. Dovidio & Samuel L. Gaertner, eds., Academic Press, Inc.) (1986).

[4] The Brief of Industrial-Organizational Psychologists as *Amici Curiae* in Support of Respondents, filed in this case, addresses the specific context of test-based selection. This brief, therefore, focuses on other manifestations of bias in selection processes.

1. *Covert bias.* While overt discrimination is on the wane when compared with past decades, it has in some cases been replaced by covert (but intentional) discrimination which, when spread out across multiple actors in an institution, is exceedingly difficult to detect. As this Court has long recognized, covert racial animus that results in discriminatory outcomes is unlawful, yet often difficult to identify, requiring reliance on legal inference. *See, e.g., Miller-El v. Dretke*, 545 U.S. 231, 246 (2005) (failure to provide reasonable explanation for voir dire dismissals suggests pretext for discrimination); *Batson*, 476 U.S. at 91-92 (inference of discrimination raised by removal of qualified black jurors); *Arlington Heights*, 429 U.S. at 266 (court must look to circumstantial evidence of discriminatory intent); *McDonnell Douglas*, 411 U.S. at 805 (statistical evidence may demonstrate pattern of discriminatory practice).

One recent study documented the dramatic effect that covert discrimination can have on African Americans and Hispanics in the employment context. Devah Pager & Bruce Western, RACE AT WORK, REALITIES OF RACE AND CRIMINAL RECORD IN THE NYC JOB MARKET 1 (2005). The study matched teams of young men of different races but with similar verbal skills, interactional styles, and physical appearance, provided them with identical training and virtually identical fictitious resumes, and sent them out to apply for 1,470 real entry-level jobs in New York City. *Id.*

The results were startling: white applicants with virtually identical qualifications received a

positive response rate almost twice that of black applicants with the same qualifications. *Id.* at 2. Hispanics were slightly less likely than whites to receive a positive response. *Id.* White applicants with otherwise equal qualifications but who admitted to a prior felony conviction as part of the application process were still more likely to receive a positive response to their application than similarly qualified black applicants who had *no* prior felony conviction.

While white applicants with felony convictions were substantially less likely to receive a positive response than white applicants with no prior criminal record, Hispanic applicants with no felony conviction scored only slightly higher than white applicants who admitted to a criminal record. These results led the authors of the study to conclude that "race appears to overtake all else in determining employment opportunities." *Id.*

But for the study, the job interactions would likely have appeared normal to the applicants. In one example, three testers with equal qualifications applied for the same position. The black and Hispanic testers were told that the position had been filled. The white tester, who applied after the other two, was instead hired on the spot. "Incidents such as these illustrate the ease with which contemporary acts of discrimination can remain completely undetected." *Id.*

The same is true, research shows, with respect to linguistic profiling that can occur over the telephone. "It is clear that speakers of nonstandard

dialects face significant disadvantages in the job market." Dawn L. Smalls, *Linguistic Profiling and the Law*, 15 STAN. L. & POL'Y REV. 579, 580 n.9 (2004). Individuals have been discriminated against because they did not sound "black enough," because they sounded "too black," and because they "did not sound white enough." *Id.* at 604 (collecting cases and materials). One study determined that listeners "correctly identified [among white, black and Hispanic] dialects more than 70 percent of the time." Thomas Purcell, William Idsardi & John Baugh, *Conceptual and Phonetic Experiments on American English Dialect Identification*, 18 J. OF LANG. AND SOC. POL'Y 10, 22 (Mar. 1999). The study concluded that "[d]iscrimination induced by speech characteristics does take place." *Id.* at 28.

Even absent the display of *any* physical or linguistic characteristics, discrimination occurs when employers assign racial characteristics to an applicant based solely on the applicant's name. In one study, testers created resumes and assigned "very White sounding names (such as Emily Walsh or Greg Baker)" to half of the resumes, and "very African American sounding names (such as Lakisha Washington or Jamal Jones)" to the other half. Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, AM. ECON. REV. 991, 992 (Sept. 2004).

Testers sent resumes to over 1300 employment ads in Chicago and Boston newspapers. *Id.* The resumes documented either a high quality

applicant or a lower quality of applicant, and testers typically sent one of each for the applicants with white-sounding names, and one of each for applicants with black sounding names to each position applied for. The study found "large racial differences in callback rates." Applicants with white sounding names had to send out ten resumes to get one callback, whereas applicants with African American sounding names had to send out approximately fifteen resumes to get one callback. *Id.* The gap between applicants with highly qualified resumes was even more strongly tilted in favor of applicants with white-sounding names. *Id.* at 993.

Even though these practices may result from intentional discrimination, they are difficult to detect and, often, first come to light because of racially disparate outcomes. *See e.g., Parham v. S.W. Bell Tel. Co.*, 433 F.2d 421, 425-26 (8th Cir. 1970) ("In cases concerning racial discrimination, statistics often tell much and Courts listen." (quoting *Alabama v. United States*, 304 F.2d 583, 587 (5th Cir.), *aff'd per curiam*, 371 U.S. 37, 83 (1962))); *Roberts v. Texaco*, 979 F. Supp. 185 (S.D.N.Y. 1997); Brent Wade, *Fueled By Bigotry, Book Review*, WASH. POST, June 14, 1998, at X07 (recounting the details of the *Roberts v. Texaco* case of racial discrimination in hiring and promotion practices and discovery of covert racism among senior corporate executives). Preserving the latitude of public and private institutions to act upon such evidence—including by suspending decisionmaking and investigating alternatives—is crucial to the protection of equal opportunity for all.

2. *Institutional or Systemic Bias.* Systemic bias occurs when a process or procedure within an institution perpetuates unequal opportunity or is crafted to the skills or needs of one group, but not others. *See Teamsters*, 431 U.S. at 349.

Present-day procedures and policies may be based on prior discriminatory assumptions or practices that are resistant to change and thus employees who are merely executing "the rules" may be perpetuating discriminatory practices. *See, e.g., Griggs*, 401 U.S. at 430 (noting that selection procedures based on intelligence tests and high school graduation requirements perpetuated racial discrimination because blacks had "long received inferior education in segregated schools"); *Teamsters*, 431 U.S. at 349 ("[T]ests neutral on their face, or even neutral in [their] intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices" and "perpetuates the effects of prior discrimination" quoting *Griggs*, 401 U.S. at 430)); *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 731 (2003) ("[D]ifferential [family and medical] leave policies were not attributable to any differential physical needs of men and women, but rather to the pervasive sex-role stereotype that caring for family members is women's work."); *see generally* Ian F. Haney Lopez, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE L.J. 1717 (June 2000).

In *Teamsters*, the Court described the circumstances in *Asbestos Workers Local 53 v.*

Vogler, 407 F. 2d 1047 (5th Cir. 1969), in which a challenged practice perpetuated the effects of prior discrimination:

> There a union had a policy of excluding persons not related to present members by blood or marriage. When in 1966 suit was brought to challenge this policy, all of the union's members were white, largely as a result of pre-Act, intentional racial discrimination. The court observed: While the nepotism requirement is applicable to black and white alike and is not on its face discriminatory, in a completely white union the present effect of its continued application is to forever deny to negroes and Mexican-Americans any real opportunity for membership.

Teamsters, 431 U.S. at 349 n.32 (quoting *Vogler*, 407 F. 2d at 1054) (internal quotation marks omitted).

Particularly for large public employers—and historically demonstrated in the case of firefighters and other public services—the discriminatory effect of nepotism, word-of-mouth recruiting, or other practices susceptible to institutional bias may initially come to light only through racial imbalances in the workforce. *See, e.g., Cleveland Branch, NAACP v. City of Parma*, 263 F.3d 513, 521 (6th Cir. 2001) (district court erred when it entered summary judgment on behalf of city that engaged primarily in word-of-mouth advertising of municipal police, firefighter, and other positions); *see also Thomas v.*

Wash. County Sch. Bd., 915 F.2d 922, 925 (4th Cir. 1990) (district court erred when it ignored evidence of racial disparities of the work force that was in part due to word-of-mouth hiring procedures); *Nelson v. Wal-Mart Stores, Inc.*, 245 F.R.D. 358, 366-67 (E.D. Ark. 2007) ("[T]he nature of word-of-mouth recruiting is to prevent members of a protected class from even knowing about employment opportunities.")

One study described in detail the impact of "word of mouth" recruiting of grand jurors in Los Angeles County, California extending back to the 1960s and continuing to contemporary times. *See* Lopez, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination, supra.* The judges of the Los Angeles Superior Court selected grand jurors, and typically did so from among friends, neighbors, and social acquaintances. *Id.* at 1736-37. Mexican Americans were almost never a part of the judges' social circles, and represented just slightly more than one percent of grand jurors seated from 1959 to 1969, even though they constituted more than 18% of the total population. *Id.* at 1742.

Although the judges did not appear to have acted with discriminatory intent, the effect of the "pick a friend" selection process was to exclude Mexican Americans almost entirely from grand juries. *Id.* at 1722, 1739-40. In short, the judges, who apparently had no overt intent to discriminate, engaged in a process that had a discriminatory and harmful effect, and that process became institutionalized.

In some instances, an institution itself may serve as an "amplifier" for the overt, covert, or implicit biases of those who staff its operation, particularly where the institution is premised on discretionary, subjective decisionmaking. This effect has been documented in a recent paired testing study of financial institutions that revealed disparate impact due to structural flaws in the mortgage lending industry's procedures. Office of Policy Dev. and Research, U.S. Dep't of Housing and Urban Dev., *All Other Things Being Equal: A Paired Testing Study of Mortgage Lending Institutions* (Apr. 2002). The study paired two testers—one white and one minority—who posed as first time homebuyers with virtually indistinguishable credit portfolios. *Id.* at 1.

African-American and Hispanic homebuyers received less favorable treatment than comparable whites when they visited mortgage lending institutions to inquire about financing options, including being offered lower loan amounts, being denied basic information about loan amounts and house pricing, being told about fewer loan products, being offered less coaching, and receiving less follow up. *Id.*

The source of this institutional bias is difficult to determine. Although it could have been the result of personal bias on the part of various loan officers, approximately one half of the test pairs met with different loan officers within the same mortgage lending institution. *Id.* at 23. Test results were "stratified by whether testers saw the same loan officer or different loan officers" and "the patterns of

differential treatment remained essentially the same." *Id.* This suggests that the institutional bias resulted from something other than individual loan officers' bias amplified to the institutional level.

The identification and investigation of disparate outcomes in other contexts, such as the juvenile justice system and the administration of federal agricultural assistance, has led to effective institutional reform. An initial investigation by the National Coalition of State Juvenile Justice Advisory Groups (now the Coalition for Juvenile Justice) in 1988 led to the 1988 Amendments to the Juvenile Justice and Delinquency Prevention Act of 1974 requiring states to address "disproportionate minority contact" in their state plans for participation in the Formula Grants Program.[5] In 1991, minority youth were 32 percent of the juvenile population nationwide but represented 65% of the juveniles detained, an increase from 53% of juveniles detained in 1983 despite no change in the minority proportion of the national juvenile population. *Disproportionate Minority Confinement 2002 Update* at 1 (internal citation omitted).

Recognizing disparate effects of state policy relating to contact and confinement of minors, the Department of Justice commissioned a comprehensive analysis of twenty years of juvenile justice system research literature. It found that

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[5] Office of Juvenile Justice and Delinquency Prevention, *Disproportionate Minority Confinement 2002 Update iii* (Sept. 2004) [hereinafter *Disproportionate Minority Confinement 2002 Update*].

"approximately two-thirds of the reviewed research indicated that a youth's racial status made a difference at selected stages of juvenile processing. . . independent of the type of research design employed." Pope et al., DISPROPORTIONATE MINORITY CONFINEMENT: A REVIEW OF THE RESEARCH LITERATURE FROM 1989 THROUGH 2001, at 2 (2002).

The Department of Justice has since concluded that "[t]here is substantial evidence that minority youth are often treated differently from majority youth within the juvenile justice system." Office of Juvenile Justice and Delinquency Prevention, *Minorities in the Juvenile Justice System* 3 (Dec. 1999). Whether the disparities in contact and confinement occur because individual officials who administer the system are biased, or due to some other more fundamental systemic flaw, the result is that discrimination is embedded in the institutional structure of the governmental organization.

Institutional bias of this sort necessarily requires proactive institutional action to reestablish freedom from discrimination. In the case of disparate treatment of minorities within the juvenile justice system, appropriate statistical and social science analysis led to further voluntary, systemic reform in the Office of Juvenile Justice and Delinquency Prevention, as well as elevation of disproportionate minority contact as a concern in support to states. By acknowledging disparate effects of policy and acting upon best research and statistics, the Department of Justice reduced, between 1990-91 and 1996-97, the disparity between

white and black juvenile proportions in all but two stages of the juvenile justice system. *Disproportionate Minority Confinement 2002 Update* at 3.

Another example of institutional bias identified through governmental response to disparate results involves discrimination against African-American farmers by the U.S. Department of Agriculture. A 1990 congressional report found, among other things, that black-owned farms were going out of business at a rate three times that of white farms. 136 Cong. Rec. S10727-03 (daily ed. July 26, 1990) (Statement of Sen. Fowler). The report helped to elevate decades of previously-ignored complaints by African-American farmers around the country, catalyzing a process that ultimately identified gross discrimination by agency officials and led to a negotiated remedial system. *Pigford v. Glickman*, 185 F.R.D. 82 (D.D.C. 1999); Cassandra Jones Havard, *African-American Farmers and Fair Lending: Racializing Rural Economic Space*, 12 STAN. L. & POL'Y REV. 333 (2001).

In December of 1996, for example, the Secretary of Agriculture appointed a Civil Rights Action Team to "take a hard look at the issues and make strong recommendations for change." *Pigford*, 185 F.R.D. at 88. In 1997, the Action Team concluded that "minority farmers have lost significant amounts of land and potential farm income as a result of discrimination by [Farm Services Agency] programs. . . ." *Id.* The same year, the Office of the Inspector General of the USDA issued a report stating that the agency had "a

backlog of complaints of discrimination that had never been processed, investigated [or] resolved." *Id.* Subsequent litigation and advocacy led to congressional action, a consent decree, and a detailed remedial system for farmers aggrieved by USDA lending and related discrimination. *See generally Pigford,* 185 F.R.D. 82.

The black farmers' decades-long odyssey powerfully illustrates why public entities must have the power to investigate and respond to statistical evidence of discrimination, including by suspending questionable selection processes in order to explore less discriminatory approaches. Under petitioners' flawed interpretation of the law, doing so is itself unlawful discrimination. Precedent, research, and experience make clear, however, that reassessing procedures based on emerging evidence is core to ensuring equal opportunity. This is especially true in the case of governmental actors, who are typically responsible for the diffuse decisionmaking of multiple departments, systems and individuals.

3. *Implicit Bias.* Overwhelming social science research indicates that subconscious or "implicit" bias, particularly against people of color, remains a significant obstacle to equal opportunity. *See, e.g.*, Kristin A. Lane et al., *Implicit Social Cognition and the Law*, 3 ANN. REV. L. & SOC. SCI. 427 (2007).

These implicit biases grow out of the human organism's need to categorize and sort a vast amount of information every day. Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489-1593 (2005) (citing multiple social science studies in support). Humans

"simplify the datastream at every stage of information processing through the use of" categorization. *Id.* at 1499. The resultant categories rely on oversimplifications, generalizations, associations, and stereotypes, including racial stereotypes, to process quickly incoming information. Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1188 (1995).

At one level, they are adaptive and unavoidable. "If our species were 'programmed' to refrain from drawing inferences or taking action until we had complete, situation specific data about each person or object we encountered, we would have died out long ago." *Id.* But when they come into play in the context of employment decisionmaking, they threaten unlawfully to deny equal opportunity in ways that are not visible or evident without probing and investigation.

When it comes to race and ethnicity, moreover, these are not "equal opportunity" impulses. Rather, studies have shown that humans often rely on generalizations tied to socially-constructed stereotypical beliefs rather than on generalizations more consistent with reality. David L. Hamilton & Terrence L. Rose, *Illusory Correlation and the Maintenance of Stereotypic Beliefs*, 39 J. OF PERSONALITY & SOC. PSYCHOL. 832, 832 (1980); *cf. Hibbs*, 538 U.S. at 729-30 (summarizing the history of state laws limiting women's equal employment opportunities relying on stereotypes of women as

necessarily restricted by requirements of reproduction).

This is not to say that racial bias in hiring or promotions is inevitable. Rather, because implicit biases are ubiquitous and frequently invisible even to the perpetrator, preventing them from infecting employment decisions requires vigilance and proactivity in response to, among other things, disparate outcomes. Over the last decade, the existence of implicit bias has been documented extensively, as exemplified through application of the Implicit Association Test ("IAT").[6] Racially focused IATs pair pictures of human faces of different races or ethnicities with words that have a generally positive connotation, words that have a generally negative connotation, and words that are associated with specific racial categorizations. Kang, *Trojan Horses of Race*, at 1510.

The test is iterative, with test takers being asked to respond to combinations of images and words by striking a particular key on a computer keyboard. The combinations change from iteration to iteration. For example, in one iteration the test might require a response when African-American faces are paired with negative words and white faces are paired with positive words, or vice versa.

If a test taker must overcome a stereotype—or an implicit bias—it will take the test taker longer to strike the required key. Thus the test has found, for

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[6] A version of the Project Implicit IAT can be taken here: https://implicit.harvard.edu/implicit/research/.

example, that test takers who had an implicit pro-white bias had faster response times when the word "success" was paired with a white face. In tests taken from 2000 to 2006, the study found that three-quarters of whites have an implicit pro-white/anti-black bias, and blacks split evenly between pro-black and pro-white biases. According to the Director of Project Implicit, "our brains automatically make associations based on our experiences and the information we receive, whether we consciously agree with those associations or not." Charles M. Blow, *A Nation of Cowards?* N.Y. TIMES, Feb 21, 2009, at A21. *See also* Anthony G. Greenwald *et al.*, *Understanding and Using the Implicit Association Test: I. An Improved Scoring Algorithm*, 85 J. PERSONALITY & SOC. PSYCHOL. 197 (2003).

Such automatic negative associations may lead to discrimination in contradiction to our national policy of equal opportunity. Renowned social psychologist Alexander Green has demonstrated the real-world impact of racial bias in the provision of health care. Alexander R. Green et al., *Implicit Bias among Physicians and its Prediction of Thrombolysis Decisions for Black and White Patients*, 22 J. GEN. INTERN. MED. 1231 (2007). In the study, physicians were found to have implicitly stereotyped African-American patients as less cooperative, and were less likely to treat them with life-saving drugs. The study used the physicians' self-report regarding racial prejudice, IATs to assess implicit bias, and vignette tests to see how the physicians would perform in real life situations. *Id.* The vignettes described male patients, some white and some black, with identical

signs and symptoms of possible myocardial infarction. *Id.*

Doctors who self-reported no explicit preference for white patients over black patients actually did implicitly prefer white patients. *Id.* at 1233-35. Similarly, doctors who self-reported no difference in cooperativeness of white patients versus black patients in fact had an implicit stereotype of black patients as less cooperative. Furthermore, the greater a doctor's bias for white patients as measured by the test, the more likely they were to treat white patients, and the less likely they were to treat black patients, with life-saving thrombolytic drugs. *Id.* at 1235. The study thus linked the doctors' implicit biases with discriminatory—and life-threatening—outcomes in healthcare treatment.

Implicit biases do not operate outside the legal framework for identifying discrimination. This Court noted in *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988), that "subconscious stereotypes and prejudice" remained "a lingering form of the problem that Title VII was enacted to combat," *id.* at 982, and that such biases have "precisely the same effects as a system pervaded by impermissible intentional discrimination," *id.* at 990.

Contemporary forms of intentional and unintentional bias continue to deny equal opportunity in a number of sectors, including employment. The Title VII framework provides for employers to respond when the presence of disparate outcomes suggests the possibility of underlying

biases that may infect the organization's procedures. By investigating the discrepancies, and identifying whether the organization's procedures serve legitimate business needs and whether less discriminatory alternatives are available, employers further the statutory and constitutional goals of assuring equal opportunity. This Court should preserve and enhance employers' ability forthrightly to do so.

C. International Consensus Supports the Legality of Voluntarily Attending to the Discriminatory Results of Facially Neutral Practices

Interpreting Title VII in this manner is also consistent with international law. While the task of interpreting domestic law is the purview and responsibility of U.S. courts, this Court has recognized the value of international authority as "instructive for its interpretation" of federal law. *Roper v. Simmons*, 543 U.S. 551, 575-76 (2005); *see also Grutter v. Bollinger*, 539 U.S. 306, 342-43 (2003) (Ginsburg, J., concurring) (noting as instructive the international understanding for and limits to proactive government actions as embodied in the international Convention on the Elimination of All Forms of Racial Discrimination); *Lawrence v. Texas*, 539 U.S. 558, 573 (2003) (Kennedy, J.).

The International Convention on the Elimination of All Forms of Racial Discrimination ("CERD"), a treaty which the United States has

signed and ratified,[7] is instructive in resolving the case at bar.[8] As of March 19, 2009, 173 nations had become parties to CERD, representing a broad intergovernmental consensus regarding "measures for speedily eliminating racial discrimination in all its forms and manifestations . . . ." CERD, pmbl.

Like Title VII, CERD specifically requires that governments eliminate behavior that is unnecessarily discriminatory *in effect*. CERD, art. 1(a) ("[R]acial discrimination" is "any distinction, exclusion, restriction or preference based on race, color, descent, or national or ethnic origin which has the *purpose or effect* of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life." (emphasis added)).

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[7] CERD, 660 U.N.T.S. 195, was originally signed September 28, 1966, entered into force January 4, 1969 and ratified by Congress on October 24, 1994. *See* 140 Cong. Rec. S7634.

[8] Where possible, the Court should interpret Title VII in consonance with CERD and other international laws, because "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). For the reasons described elsewhere in this brief, however, the Court need not reach this question in order to resolve the case at bar. *Amicus* does not argue that enforcement of the treaty itself is directly implicated here.

In its General Recommendation no. 14 of 22 March 1993 on the definition of discrimination, the Committee on the Elimination of Racial Discrimination, the UN body responsible for administering the treaty, noted, *inter alia*, that "[i]n seeking to determine whether an action has an effect contrary to the Convention, [the Committee] will look to see whether that action has an unjustifiable disparate impact upon a group distinguished by race, colour, descent, or national or ethnic origin." U.N. Office of the High Comm'r for Human Rights, Comm. on the Elim. of all Forms of Racial Discrim., *General Rec. no. 14: Definition of Discrim.* ¶1, U.N. Doc. A/48/18 (Mar. 22, 1993).

CERD, moreover, calls for governments to take proactive steps to reexamine, change, or abandon policies having an unjustified discriminatory effect. Parties to the treaty, CERD provides, "shall take effective measures to review governmental, national, and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists." Art. 2(1)(c).

Interpreting Title VII to allow the kinds of voluntary compliance efforts at issue here would be consonant with CERD.

II. EFFORTS TO ASSURE SELECTION PRACTICES ARE NOT DISCRIMINATORY DO NOT TRIGGER STRICT SCRUTINY UNDER THE EQUAL PROTECTION CLAUSE IN THE ABSENCE OF EVIDENCE THAT THEY ARE A PRETEXT FOR INTENTIONAL DISCRIMINATION

Since contemporary discrimination does not ordinarily announce itself overtly, employers must be on the lookout for other markers of unlawful discrimination. One marker is unequal outcomes, which may signal the presence of discrimination—whether covertly intentional, unintentionally implicit, or embedded in institutions. Because "[c]ooperation and voluntary compliance were selected as the preferred means for achieving this goal," *Alexander*, 415 U.S. at 44, employers act consistent with the statutory objective when they undertake such an investigation, and the Equal Protection Clause does not deprive employers of the leeway to promote equality of opportunity by examining and modifying selection procedures when evidence suggests valid alternate mechanisms can reduce the extent of the disparate outcomes.

A. Examining or Responding to Evidence that Discriminatory Outcomes are Avoidable, that Less Discriminatory Alternatives Exist, or that Selection Criteria are Valid does not Constitute Race-Based Decisionmaking

1. The Title VII framework allows—indeed requires[9]—employers faced with a process having a discriminatory effect to assess the fairness and validity of the *process* to assure that it is free of unjustified racial bias. This framework recognizes the reality that discriminatory effects may signal the presence of intentional, covert, structural, or implicit biases that, left unchecked, will frustrate equal employment opportunity.

Thus, where a promotional test has a discriminatory effect, Title VII requires the employer to assess whether the selection mechanism is job related and dictated by business necessity, and whether other less discriminatory alternatives are available. 42 U.S.C. § 2000-e2(k)(1)(A)(i). If an employer legitimately validates its promotional test, and is confident that no less discriminatory test is available, it may typically accept the results of that

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[9] Because this case addresses what public employers may voluntarily do to comply with Title VII, the Court need not address what, precisely, Title VII might require in the circumstances of this case.

test, whatever the racial composition of the finalists the test produces.[10]

The Title VII framework assures that the focus of such an inquiry, while triggered by unequal outcomes, is on the job relatedness and necessity of, and alternatives to, the procedures that led to those outcomes, rather than on the unequal outcomes themselves or the specific individuals ultimately selected. Since a principal focus of Title VII is to address discrimination and bias in its various and evolving forms, *see, e.g., Teamsters*, 431 U.S. at 348-349, a focus on *procedures* that result in discriminatory outcomes is squarely within the proper scope of the statute.

Petitioner's contention that New Haven's action was "race-based," Pet. Br. 23-27, misapprehends the Title VII inquiry. Based on the information it received about the disparate impact of the administered test, the city investigated the mechanism by which that outcome was effectuated. Its action in correcting that mechanism was race-neutral—the test results went uncertified for all candidates. JA227.

Petitioners assume that the correction of a flawed *process* is necessarily oriented towards a

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[10] Note, however, that an employer is not *required* immediately to certify results under this scenario. Where a selection procedure has an extremely discriminatory impact that appears difficult to explain, the employer may be wise and justified to extend the search for less discriminatory alternatives.

particular racial outcome. Pet. Br. 25-26. Critically, Title VII does not mandate the ultimate racial composition of the workforce; where there is a discriminatory effect, it requires employers to scrutinize their procedures. In the end, *any* racial composition of a workforce is acceptable under Title VII, so long as the process is free of unjustified racial bias. *See Teal*, 457 U.S. 440. This Court has explained that racial balance is neither the goal of Title VII, nor a defense to a Title VII violation, which focuses on the validity of the underlying procedure.

Accordingly, in the instant case, once New Haven adopts a validated process tied to business necessity that is the least discriminatory one available,[11] it may promote the successful candidates under that process, irrespective of whether the same candidates are promoted with the same racial composition as under the prior, legally questionable examination.

2. Title VII's focus on the fairness and legality of the selection process is in contrast to cases in which this Court has found that governmental use of explicit racial classifications in an attempt to craft a particular racial outcome—target levels of racial diversity in contracting, university admissions, or school composition—warranted strict scrutiny. *See,*

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[11] Here, the exam in question was being administered for the first time. Accordingly, real world outcomes under the exam necessarily became part of the validation process. This will not be the case, however, when, in the future, New Haven administers a validated, lawful exam.

e.g., *Croson*, 488 U.S. 469; *Grutter*, 539 U.S. 306; *Parents Involved*, 127 S. Ct. 2738.

A majority of this Court rejected in *Parents Involved* the notion that governmental motivation to address racial segregation or exclusion—whether *de facto* or *de jure*—alone constitutes racial animus triggering strict scrutiny. 127 S. Ct. 2738; *see also Bush v. Vera*, 517 U.S. 952, 958 (1996) (plurality opinion) ("[S]trict scrutiny does not apply merely because redistricting is performed with consciousness of race.").

If the Court were to rule that any efforts to attend to the racial impact of decisionmaking criteria constitutes a racial classification triggering strict scrutiny under the Equal Protection Clause, it would seriously hobble efforts to identify and redress procedures that reflect or contain intentional or unintentional racial bias. Imagine, for example, that a city commission consistently awards public contracts only to white contractors despite clear evidence that many equally qualified minority contractors exist and have bid for city contracts. The City Council suspects that commissioners are engaging in *intentional* discrimination, and suspends all contract approvals until a full investigation can be completed, and alternative procedures explored.

Under the theory advanced by petitioners, each of the following would warrant strict scrutiny: (1) attending to the discrepancy between the racial composition of those selected and the city-wide pool of qualified candidates to determine if there is unwarranted discrimination; (2) suspending the

contracting process pending further investigation; (3) exploring the possibility of intentional or unintentional bias; and (4) determining whether a valid alternative procedure can avoid or mitigate the inequality of opportunity perpetrated by the existing procedure.

In addition to thwarting enforcement of a wide range of established equal opportunity laws and penalizing voluntary compliance efforts, that analysis is contrary to the Court's anti-discrimination jurisprudence. As discussed above, a long line of Equal Protection Cases, from *Yick Wo* to *Washington v. Davis* to *Village of Arlington Heights* to *Batson* to *Parents Involved* makes clear that attending to the racial impact of governmental decisions, exploring their causes, and avoiding unnecessary bias are part and parcel of ensuring freedom from discrimination—and are "race neutral" for purposes of constitutional scrutiny.

B. Where Title VII Compliance is a Pretext for Discriminatory Intent, Both the Enforcement Mechanisms of Title VII and the Equal Protection Clause are Triggered

Of course, employers may not hide behind Title VII compliance when their real motive is not assuring an appropriate selection process, but rather achieving a particular racial outcome. In such an instance, the ostensible compliance efforts would be a pretext for unlawful racial animus as well as a

violation of Title VII and, in the case of public employers, the Equal Protection Clause.

The prospect that an employer might subvert the appropriate equal opportunity goals and mechanisms of Title VII as a pretext for unlawful racial animus may be addressed by the courts through established Title VII analysis relating to discriminatory intent. *See McDonnell Douglas*, 411 U.S. at 804 (a plaintiff may demonstrate an employer's stated non-discriminatory justification is in fact pretext for intentional discrimination).

And where action taken by a public employer in purported compliance with Title VII is in fact pretext for intentional discrimination, evidence of discriminatory intent triggers strict scrutiny under the Equal Protection Clause. *Washington*, 426 U.S. at 242.

The record in the present case, viewed in the light most favorable to petitioners, does not present a question of material fact regarding the existence of pretext. To the contrary, the record shows that the city was properly focused on ensuring a fair selection process, as reflected by the transparency of its public and participatory four-day hearing process; the evidence-based nature of its inquiry into the operation of the selection criteria and the availability of less discriminatory alternatives; its focus on compliance with civil rights laws; and the demonstrable flaws in the testing process at issue. JA22-169; Resp. Br. 6-11. By contrast, there is no evidence to conclude that the city's true motive was

to manufacture a preordained racial result irrespective of the validity of the selection process.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Second Circuit should be affirmed.

Respectfully submitted,

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Dated March 25, 2009

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Nos. 07-1428/08-328

Supreme Court, U.S.
FILED
FEB 25 2009
OFFICE OF THE CLERK

In the

Supreme Court of the United States

FRANK RICCI, et al.,

Petitioners,

v.

JOHN DESTEFANO, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND THE CENTER FOR COLLEGE AFFORDABILITY AND PRODUCTIVITY IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

This case presents an important issue regarding the proper interplay between Title VII and state or municipal laws that prohibit local government from using race, sex, color, or ethnicity when making public employment decisions. Here, Article XXX, Section 172, of the New Haven City charter expressly prohibits preferences or discrimination in hiring or promotions based on race or national origin. Nevertheless, New Haven discarded its race-neutral, job-related test results based upon the racial composition of those who passed compared to those who failed, on grounds that it faced potential liability under Title VII if it used the test results. This gives rise to the following question:

When it passed Title VII, did Congress intend to leave undisturbed state and local anti-discrimination laws that operate to eliminate public employers' use of race, sex, or ethnicity in public employment decisions?

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IDENTITY AND INTEREST OF AMICI CURIAE

Pacific Legal Foundation (PLF), and the Center for College Affordability and Productivity (CCAP) respectfully submit this brief amicus curiae in support of Petitioners Frank Ricci, et al.[1]

PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. PLF has participated as amicus curiae in this Court in numerous cases relevant to this case. PLF has addressed the inequities of the disparate impact theory in *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610 (2008), *Smith v. City of Jackson, Miss.*, 544 U.S. 228 (2005), *City of Cuyahoga Falls, Ohio v. Buckeye Community Hope Found.*, 538 U.S. 188 (2003), *Adams v. Florida Power Corp.*, 535 U.S. 228 (2002), and *Alexander v. Sandoval*, 532 U.S. 275 (2001). PLF has also participated as amicus curiae in cases before this Court involving the scope and intent of Title VII of the Civil Rights Act of 1964, such as *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003), *Bd. of Trustees of the Univ. of Ala.*

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amici Curiae's intention to file this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

v. Garrett, 531 U.S. 356 (2001), and *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000).

PLF has also been at the forefront of the legal battles waged over state laws that prohibit government's use of race, sex, or ethnicity in public employment. In *Coal. for Econ. Equity v. Wilson*, 122 F.3d 692 (9th Cir. 1997), as amicus, PLF successfully defended California's Proposition 209 which amended the California Constitution to prohibit government from:

> discriminat[ing] against, or grant[ing] preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

Cal. Const. art. I, § 31(a). PLF attorneys were counsel of record in *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 24 Cal. 4th 537, 12 P.3d 1068 (2000) (invalidating a race-conscious city contracting program under Proposition 209). PLF attorneys, representing the drafters and sponsors of Michigan's Proposal 2, the sister initiative of Proposition 209, participated as amicus curiae in successfully defending the constitutionality of this newly adopted state law in *Coal. to Defend Affirmative Action v. Regents of the Univ. of Mich.*, 539 F. Supp. 2d 924 (D. Mich. 2008).

CCAP is a nonprofit organization dedicated to research on the issues of rising costs and stagnant efficiency in higher education in the United States, with an emphasis on how market forces can be used to make higher education more affordable while increasing quality.

This case raises important issues of constitutional law, public policy, and statutory interpretation regarding the extent to which race-conscious decisions may be used to avoid "disparate impact" liability under Title VII. Amici argue that Title VII does not preempt state and municipal laws that limit state and local government's discretion to use race, sex, or ethnicity in the employment context.

SUMMARY OF ARGUMENT

The City of New Haven decided to set aside the results of a promotion test for firefighters when too few minority candidates would be promoted if the test results were allowed to stand. The City feared that certifying the test results would expose it to liability under a "disparate impact" theory of discrimination. New Haven's decision brings into sharp focus how allowing racial disparities alone to provide the basis for a claim of unlawful discrimination leads to the type of race-based decisionmaking that Title VII was originally intended to eradicate.

New Haven made this decision notwithstanding Article XXX, Section 172, of its city charter (Section 172), which prohibits preferences or discrimination based on race or sex in civil service hiring decisions.[2] Section 172 is but one example of state or local laws that prohibit government from using race, sex, or ethnicity in official decisionmaking. The states of California, Michigan, Washington, and Nebraska have enacted statewide laws that likewise

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[2] Article XXX, Section 172, provides in part: "No person . . . shall be appointed, promoted, reduced, removed, or in any way favored or discriminated against because of race, sex, age, national origin, or political or religious opinion or affiliation."

prohibit preferences or discrimination based on race or sex. With language similar in form and identical in effect to New Haven's City charter, California adopted Proposition 209 in 1996. The operative provision of Proposition 209 provides:

> The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

Cal. Const. art. I, § 31(a). Identical language appears in the constitutions of Michigan (art. I, § 26(2)) and Nebraska (art. I, § 30(1)) as well as the Revised Codes of Washington (Section 49.60.030). The intent and effect of such state anti-discrimination laws is to eliminate government's authority to redistribute opportunities based on these immutable characteristics.

Although Plaintiffs did not challenge the decision to discard the test results as being a violation of Section 172, a decision by this Court that condones such race-based decisionmaking under the auspices of Title VII will weaken such laws considerably. Such a decision would be contrary to Title VII's clearly expressed legislative intent and plain language. *See, e.g., Coal. for Econ. Equity*, 122 F.3d at 710 (finding Title VII does not preempt Proposition 209); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 103 n.24 (1983) (finding state fair employment laws were not preempted by Title VII).

Nevertheless, groups opposed to such laws have attacked them on grounds that they are preempted by

Title VII of the Civil Rights Act of 1964. For example, plaintiffs challenging California's Proposition 209 unsuccessfully argued that Title VII preserves public employers' discretion to use race and sex preferences. *Coal. for Econ. Equity*, 122 F.3d at 709. The Ninth Circuit Court of Appeals rejected plaintiffs' argument that because Proposition 209 eliminates such preferences, Proposition 209 is preempted by Title VII. *Id.* The Ninth Circuit stated that Title VII will preempt state laws only where there is an actual conflict, and that "Proposition 209 does not remotely purport to require the doing of any act which would be an unlawful employment practice under Title VII." *Id.* at 710.

Amici contend that Title VII's legislative history and an unbroken chain of court decisions examining Title VII's intent show that it does not preempt state and local laws that prohibit preferences and discrimination based on race, sex, or ethnicity.

Here, the City of New Haven's actions were an unadorned attempt to redistribute employment opportunities based upon race or sex. A decision from this Court that permits such actions by a public employer will open the door to identical actions throughout the nation. State and local governments will have their anti-discrimination laws weakened by a decision that permits public employers to reject race-neutral and job-related test results in order to achieve racial balancing under the auspices of Title VII.

This Court should clarify that state and local anti-discrimination laws do not conflict with, and in fact support, the policy objectives of Title VII and are therefore not preempted by Title VII.

ARGUMENT

TITLE VII DOES NOT PREEMPT STATE OR LOCAL LAWS REQUIRING RACE-NEUTRAL EMPLOYMENT DECISIONS

Many states and municipalities have laws that prohibit discriminatory race-based employment practices. Title VII, by its plain language, does not preempt these laws. Thus, federal courts may not rely upon Title VII to relieve municipalities of the duty to comply with such laws. Amici urge this Court to recognize that a decision condoning the use of race-based criteria for decisions in public employment will undermine the validity and effect of such laws.

In this case, the City of New Haven's charter, Article XXX, Section 172, provides in relevant part: "No person . . . shall be appointed, promoted, reduced, removed, or in any way favored or discriminated against because of race, sex, age, national origin, or political or religious opinion or affiliation." In *Kelly v. City of New Haven*, 275 Conn. 580, 881 A.2d 978 (2005), the Connecticut Supreme Court rejected the City of New Haven's efforts to extend its discretion in civil service hiring beyond the bounds set by its charter. *Id.* at 623 ("This court will not endorse an effort to interpret out of existence the legislative check on discretion that the legislators have chosen to keep in place.").

This prohibitory language in the New Haven City charter is similar in form and identical in function to statutes or constitutional provisions adopted by several states that operate to prohibit state and local governments' use of race, sex, or ethnicity in public

employment. The states of California, Washington, Michigan, and Nebraska have adopted statewide laws containing identical operative language:[3]

> The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

Cal. Const. art. I, § 31(a).[4] Groups opposing such state anti-discrimination laws have unsuccessfully argued that Title VII preempts such laws because they interfere with public entities' voluntary compliance with Title VII's objectives. This Court should clarify that such laws are not preempted by Title VII.

A. Congress Did Not Intend Title VII to Preempt Laws Prohibiting Race-Based Employment Decisions

In determining whether a state law is preempted by federal law and therefore invalid under the Supremacy Clause, a reviewing court's "sole task is to ascertain the intent of Congress." *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 280 (1987) (Marshall, J., plurality opinion). Preemption will be found only if that was the clear and manifest purpose

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[3] California adopted Proposition 209 in November 1996. Michigan adopted identical language in November 2006. Nebraska followed suit in November 2008. The State of Washington adopted this language as a statutory rather than constitutional amendment with the passage of Initiative 200 in November 1998.

[4] These laws will be referred to herein collectively as "state anti-discrimination laws," with the understanding that they refer only to preferences or discrimination based on race or sex.

of Congress. *Id.* at 288; *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 31 (1996) (federal law does not preempt certain banks from selling insurance); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (stating "the historic police powers of the States were not to be superseded by the Federal [Warehouse] Act unless that was the clear and manifest purpose of Congress"); *Keams v. Tempe Technical Inst., Inc.*, 39 F.3d 222, 227 (9th Cir. 1994) (state tort action against trade school accreditors is not preempted by Higher Education Act).

When ascertaining congressional intent, the plain language of the statute controls absent clear evidence of a contrary intent. *Bread Political Action Comm. v. Fed. Election Comm'n*, 455 U.S. 577, 580 (1982). The plain language of Title VII itself prohibits expressly such preferential treatment at 42 U.S.C. § 2000e-2(j), which states in part:

> Nothing contained [in Title VII] shall be interpreted to require any employer . . . to grant preferential treatment to any individual . . . or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer . . . in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in . . . the available work force in any community, State, section, or other area.

This Court also noted Title VII's limited effect on state laws in *Guerra*, stating: "Congress has indicated that state laws will be pre-empted only if they actually

conflict with federal law." *Guerra*, 479 U.S. at 281 (Marshall, J., plurality opinion). Title VII does not preempt state anti-discrimination laws for the simple reason that Title VII does not *require* employers to use race and sex preferences.

The lead proponents of Title VII in the Senate, Senators Case and Clark, submitted an interpretive memorandum in support of Title VII, stating: "'[t]here is no requirement in Title VII that an employer maintain a racial balance in his work force.'" *Local 28 of the Sheet Metal Workers' Int'l Ass'n v. Equal Employment Opportunity Comm'n*, 478 U.S. 421, 459 (1986) (quoting 110 Cong. Rec. 7213 (1964)). Senator Humphrey, another proponent of Title VII, stated:

> "The proponents of this bill have carefully stated on numerous occasions that Title VII does not require an employer to achieve any sort of racial balance in his work force by giving preferential treatment to any individual or group."

Id. at 461 (quoting 110 Cong. Rec. 12723 (1964)). Senator Humphrey explained further:

> "Contrary to the allegations of some opponents of this title, there is nothing in it that will give any power to the Commission or to any court to require hiring, firing, or promotion of employees in order to meet a racial 'quota' or to achieve a certain racial balance."

Id. at 492 (quoting 110 Cong. Rec. 6549). Thus, the plain language and legislative history of Title VII confirm that the statute does not operate to invalidate state and local anti-discrimination laws.

Nor can it be said that the anti-discrimination laws noted above interfere with discretion Title VII bestows upon public employers to implement race-based affirmative action programs—because the original intent of Title VII does not bestow any such discretion. When Title VII was passed, Congress was particularly concerned with any undue interference on managerial discretion. *Local Number 93, Int'l Ass'n of Firefighters AFL-CIO C.L.C. v. City of Cleveland*, 478 U.S. 501, 519 (1986). Title VII passed on the assurance that "management prerogatives . . . are to be left undisturbed to the greatest extent possible." *Id.* at 520. Instead of preempting state anti-discrimination laws, Section 708 of Title VII "'simply left them where they were before the enactment of Title VII.'" *Shaw*, 463 U.S. at 103 n.24 (quoting *Pervel Indus., Inc. v. State of Conn. Comm'n on Human Rights & Opportunities*, 468 F. Supp. 490, 493 (D. Conn. 1978)).

In enacting Title VII, Congress was not legislating about preferential treatment or quotas in employment because it believed that "the problems raised by these controversial questions are more properly handled at a governmental level closer to the American people and by communities and individuals themselves." *United Steelworkers of America, AFL-CIO-CLC v. Weber*, 443 U.S. 193, 207 n.7 (1979) (quoting remarks of Rep. MacGregor, 110 Cong. Rec. 15893 (1964)).

Likewise, in *Griggs v. Duke Power Co.*, 401 U.S. 424, 430-31 (1971), this Court stated:

> Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any person be hired

> simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed.

Congress' intent to enshrine *equality* as the standard of conduct under Title VII is wholly consistent with the intent behind state and local anti-discrimination laws. As a result of the harmony between both the intent and the effect of Title VII and anti-discrimination laws, Title VII does not operate to preempt such laws.

B. Title VII Does Not Require Race-Based Employment Decisions and Therefore Does Not Conflict With State Prohibitions on Race-Based Decisions

Whether Title VII should prohibit or require the use of racial preferences was the subject of much debate prior to its enactment. Many representatives were concerned that Title VII would unduly interfere with private business management decisions. *Local Number 93, Int'l Ass'n of Firefighters, AFL-CIO C.L.C.*, 478 U.S. at 519. To avoid this unwanted result, Congress neither mandated nor prohibited the use of racial preferences in employment. *Local 28 of the Sheet Metal Workers' Int'l Ass'n*, 478 U.S. at 463 (observing that Title VII, Section 703(j) [codified at 42 U.S.C. § 2000e-2(j)] "stated expressly that the statute did not require an employer or labor union to adopt quotas or preferences simply because of a racial imbalance").

In *United Steelworkers*, this Court made clear its view that after Section 2000e-2(j) was adopted, "congressional comments were all to the effect that employers would not be *required* to institute preferential quotas to avoid Title VII liability." *United Steelworkers of America, AFL-CIO-CLC*, 443 U.S. at 207 n.7.

Numerous decisions have concluded Title VII does not mandate race- and sex-preferential treatment for minorities or women. *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 993 (1988) ("Preferential treatment and the use of quotas by public employers subject to Title VII can violate the Constitution."); *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 259 (1981) ("Title VII, however, does not demand that an employer give preferential treatment to minorities or women."); *United Steelworkers of America*, 443 U.S. at 205 (rejecting the argument that Title VII prohibits voluntary affirmative action efforts); *Coal. for Econ. Equity*, 122 F.3d at 709-10 (finding Title VII does not preempt California's Proposition 209); *Liao v. Tenn. Valley Auth.*, 867 F.2d 1366, 1369 (11th Cir. 1989) (absent a showing of discrimination, there is no Title VII cause of action for failure to implement or utilize an affirmative action program).

This Court has repeatedly found that Title VII *allows* but does not *require* affirmative action programs that target minorities and women. *Johnson v. Transp. Agency, Santa Clara County, Cal.*, 480 U.S. 616, 644 (1987) (Stevens, J., concurring) (stating that Title VII "does not *require* any employer to grant preferential treatment on the basis of race or gender"); *United Steelworkers of America*, 443 U.S. at 208 (holding that Title VII's prohibition against racial discrimination

does not condemn all private, voluntary affirmative action plans).

In *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577-78 (1978), this Court stated that "Title VII . . . does not impose a duty to adopt a hiring procedure that maximizes hiring of minority employees." As part of its analysis of the burden-shifting framework for cases arising under Title VII, the *Furnco* Court stated: "[i]t is clear beyond cavil that the obligation imposed by Title VII is to provide an equal opportunity for each applicant regardless of race, without regard to whether members of the applicant's race are already proportionately represented in the work force." *Id.* at 579.

Federal circuits have likewise held that the Civil Rights Act permits voluntary adoption of special programs, but does not require any employer to grant preferential treatment on the basis of race or sex. In *Yatvin v. Madison Metro. Sch. Dist.*, 840 F.2d 412, 415 (7th Cir. 1988); the Seventh Circuit held: "[t]he Constitution and Title VII have been held, with exceptions irrelevant here, to permit affirmative action; they do not require it." *See also Liao*, 867 F.2d at 1369; *Bratton v. City of Detroit*, 704 F.2d 878, 883-84 (6th Cir. 1983).

Consistent with these decisions regarding Title VII, the constitutionality of state anti-discrimination laws has been upheld against all manner of attack. In *Coal. for Econ. Equity*, the Ninth Circuit rejected the argument that California's anti-discrimination amendment, Proposition 209, was preempted by Title VII. Referring to Section 2000e-7's prohibition on state laws that "require or permit the doing of any act which would be an unlawful

employment practice," the Ninth Circuit said, "Proposition 209 does not remotely purport to require the doing of any act which would be an unlawful employment practice under Title VII. Quite the contrary, '[d]iscriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed.'" *Coal. for Econ. Equity*, 122 F.3d at 710 (quoting *Griggs*, 401 U.S. at 431). In *Coal. to Defend Affirmative Action*, 539 F. Supp. 2d at 930, the district court found that "Proposal 2 does not violate the United States Constitution."

The California Supreme Court relied upon Proposition 209 to invalidate a race-conscious public contracting program in *Hi-Voltage*. There, the court recognized that Proposition 209 was consistent with the original intent of Title VII, stating that "in approving Proposition 209, the voters intended section 31, like the Civil Rights Act as originally construed, 'to achieve equality of [public employment, education, and contracting] opportunities.'" *Hi-Voltage*, 24 Cal. 4th at 561-62 (quoting *Griggs*, 401 U.S. at 429). *See* Eugene Volokh, *The California Civil Rights Initiative: An Interpretive Guide*, 44 UCLA L. Rev. 1335, 1345 (1997) (noting that like Title VII itself, Proposition 209 "bars discrimination against or preferential treatment in favor of 'any individual or [to any] group'" (quoting 42 U.S.C. § 2000e-2(j))).

Race-conscious employment decisions should not be allowed to stand by resorting to an imaginary conflict between state anti-discrimination laws and Title VII. So it is with New Haven's race-conscious decision to abandon its promotional test results. Although the district court's decision did not address this issue, New Haven's race-based decision to abandon

its test results violates it's city charter and is therefore unlawful. Title VII cannot be used to shield race-conscious decisions that violate state and local anti-discrimination laws. A decision from this Court that Title VII preempts local and state prohibitions on preferences based on race, sex, or ethnicity would significantly undermine the validity of such anti-discrimination laws and the lower court decisions that have upheld them.

CONCLUSION

The discrimination that took place in this case was not in the City of New Haven's promotional testing process—regardless of the racial composition of those who passed compared to those who failed. Rather, it was when New Haven decided to treat those who passed the exam as if they had failed in order to manipulate the racial composition of the list from which promotions would be made. Such a blatantly race-conscious decision, made to lower the likelihood of a potential disparate impact claim, constitutes the precise type of discrimination that Title VII was designed to prohibit. The City of New Haven should not be allowed to offer up those who passed the race-neutral and job-related promotional exam as a sacrifice to achieve racial balance.

In the course of reversing the Second Circuit Court of Appeals' decision, this Court should clarify that state and local anti-discrimination laws are not preempted by Title VII.

DATED: February, 2009.

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Nos. 07-1428 & 08-328

IN THE

Supreme Court of the United States

FRANK RICCI, ET AL.,

Petitioners,

v.

JOHN DESTEFANO, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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INTEREST OF THE *AMICUS CURIAE*[1]

The Society for Human Resource Management ("SHRM") is the world's largest association devoted to human resource management. Representing more than 250,000 members in over 140 countries, the Society serves the needs of human resource ("HR") professionals and advances the interests of the HR profession. Founded in 1948, SHRM has more than 575 affiliated chapters within the United States and subsidiary offices in China and India.

This case is of particular interest to SHRM and its members because human resource professionals are often responsible for monitoring selection procedures for possible disparate impact and, in consultation with industrial psychologists and other personnel professionals, designing and validating appropriate selection procedures for employers across the United States. SHRM and its members wish to maintain the flexibility in existing law that allows employers and other test users significant discretion in deciding how best to address disparate-impact issues: whether to proceed with a given selection procedure subject to completion of the validation process; whether to modify expected uses so as to ensure that scoring and ranking of scores are valid and fair; or whether to substitute a different selection process with a lesser disparate impact on particular groups. Such discretion best advances the user's

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[1] Counsel for all parties have consented to the filing of this brief, and those consents are on file with the Clerk of the Court. No counsel for a party in this case authored this brief in whole or in part, and no person or entity, other than *amicus* and its counsel, has made a monetary contribution to the preparation or submission of this brief.

organizational goals as well as furthering compliance with public policy directives.

SUMMARY OF ARGUMENT

In this case, the City of New Haven declined to certify test results for promotional examinations for fire department captains and lieutenants that had an undisputed adverse impact on African-American and Hispanic employees taking those tests. Under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* ("Title VII"), use of tests with such a disparate impact is a presumptive violation of the statute. Employers do not, as a matter of law, violate Title VII when they remove that presumptive violation by declining to use the challenged test results. Moreover, employers are expected, if not required, to engage in ongoing monitoring of results of selection procedures for disparate impact and to consider alternative selection procedures or methods of use with lesser disparate impact. The City of New Haven in this case was acting in conformity with the authoritative guidance of the EEOC and other federal agencies, as set forth in the Uniform Guidelines on Employee Selection Procedures.

Petitioners have no basis in the record for suggesting pretextual racial discrimination. Ongoing monitoring for disparate impact and consideration of alternative approaches with lesser disparate impact are expected, if not required, by the EEOC and reflect responsible employer behavior, not the kind of racial consciousness informing adverse employment decisions that is violative of Title VII.

STATEMENT OF THE CASE

This case involves the issue whether a public employer—here, respondents the City of New Haven, Connecticut and associated city officials—violates its obligations under Title VII of the Civil Rights Act of 1964 and/or the Equal Protection Clause of the Fourteenth Amendment when it declines to certify the results of promotional examinations for fire department supervisors having an adverse impact on African-American and Hispanic employees taking the tests. The tests in question were administered in November and December 2003. Because of an agreement with the New Haven firefighters union, the written result on the examination counted for 60% of the applicant's score and the oral examination counted for 40% of the score.

Forty-one applicants took the Captain examination, of whom 25 were white, 8 African American and 8 Hispanic. Twenty-two passed the examination, of whom 16 were white, 3 African American and 3 Hispanic. Under the "Rule of Three" in the City Charter,[2] each open position had to be filled from the among the three individuals with the highest passing scores. Thus, no African Americans and only two Hispanics would be eligible for promotions to the 7 vacant Captain positions (7 whites and 2 Hispanics were the top 9 scorers).

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[2] *See Kelly v. City of New Haven*, 881 A.2d 978, 993-94 (Conn. 2005) (explaining operation of the Rule of Three). On January 9, 2004, in an earlier stage of the *Kelly* litigation, the state trial court enjoined the City from engaging in its previous practice of rounding scores to their nearest integer, with each rounded score constituting a "rank" for purposes of the Rule of Three. Pet. App. 443a-444a.

Seventy-seven individuals took the Lieutenant examination, of whom 43 were white, 19 African American and 15 Hispanic. Thirty-four passed, of whom 25 were white, 6 African American and 3 Hispanic. Thus, no African Americans or Hispanics would be eligible to be promoted to the 8 vacancies for Lieutenant positions (the top 10 scorers were white).

The New Haven Civil Service Board held hearings between January and March 2004 on the issue of whether to certify the test results. On March 18, 2004, the Board declined to certify the examination results by a 2-2 vote. Petitioners filed this suit, alleging violations of Title VII and the Equal Protection Clause, in the District Court for the District of Connecticut.

On cross-motions for summary judgment, the District Court on September 28, 2006 denied petitioners' motion and granted respondents' motion for summary judgment. 554 F. Supp. 2d 142 (D. Conn. 2006). Evaluating the Title VII claim within the framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), the trial court assumed *arguendo* that petitioners had made out a *prima facie* case of disparate treatment on account of race and respondents had articulated a legitimate business reason, namely their desire "to comply with the letter and the spirit of Title VII." 554 F. Supp. 2d at 153. Liability then turned on whether petitioners could demonstrate that this articulated reason was a pretext for racial discrimination. The court noted that, despite some dispute over the exact racial breakdown of those passing the Captain's test, petitioners "do not dispute that the results showed a

racially adverse impact on African American candidates for both Lieutenant and Captain positions, as judged by the [Equal Employment Opportunity Commission ("EEOC")] Guidelines.[3] Thus, it is necessarily undisputed that, had minority firefighters challenged the results of the examinations, the City would have been in a position of defending tests that, under applicable Guidelines, presumptively had a disparate racial impact." *Id.* Here, under the EEOC's "four-fifths rule", *see* note 3 *supra,* the pass rate for whites on the 2003 Lieutenant's exam was 60.5%, for African Americans, 31.6%, and for Hispanics, 20%. The pass rate for both African Americans and Hispanics fell under 48%, which would have been the four-fifths score. As for the Captain's exam, "the pass rate for Caucasians was 88%, which is more than double that of minorities and thus by either party's statistic an AIR [or "adverse impact ratio"] far below the four-fifths guideline is yielded." *Id.* at 154.

Petitioners offered essentially two arguments why the City's refusal to certify the test results was pretextual race discrimination. First, they maintained that respondents' failure to complete a

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[3] Presumably, the court was referring to the Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. §§ 1607.1 *et seq.* *See Connecticut v. Teal,* 457 U.S. 440, 444 (1982) ("Petitioners do not contest the District Court's implicit finding that the examination itself resulted in disparate impact under the 'eighty percent rule' of the Uniform Guidelines on Employee Selection Procedures adopted by the Equal Employment Opportunity Commission. Those guidelines provide that a selection rate that 'is less than [80 percent] of the rate for the group with the highest rate will generally be regarded . . . as evidence of adverse impact.'") (citations omitted).

validation study of the results of the 2003 examination showed that the City's refusal was motivated by its concern with racial results rather than the job-relatedness of the test. But this contention, the district court observed, imposed a duty to validate test results not found in the Uniform Guidelines on Employee Selection Procedures ("UGESP" or "Uniform Guidelines"), promulgated by the principal federal agencies with responsibilities in the equal employment opportunity area: "The guidelines do not require or mandate a validity study where an employer decides *against* using a certain selection procedure that manifests this impact." 554 F. Supp. 2d at 155 (emphasis in original).

The trial court also rejected petitioners' second principal contention that respondents did not explore alternatives or await a validity study because they had made a racially motivated decision to set aside the test results. This contention, the court explained, was inconsistent with the Title VII policy to promote voluntary compliance: "Defendants' motivation to avoid making promotions based on a test with racially disparate impact, even in a political context, does not, as a matter of law, constitute discriminatory intent. . . ." *Id.* at 160.

The court held that summary judgment was also appropriate on the equal protection claim because the City employed no racial classification and was not acting for the purpose of harming white applicants in withholding its certification of the test results. *Id.* at 161-62.[4]

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[4] This brief does not deal with petitioners' equal protection claim.

On appeal, the Court of Appeals for the Second Circuit affirmed. The panel (consisting of Judges Pooler, Sack and Sotomayor) initially affirmed by summary order and, after the appeals court denied rehearing *en banc*, 530 F.3d 88 (2d Cir. 2008), issued a *per curiam* decision affirming for the reasons given by the District Court. 530 F.3d 87 (2d Cir. 2008).

ARGUMENT

I. AN EMPLOYER DECLINING TO USE THE RESULTS OF A SELECTION PROCEDURE HAVING AN UNDISPUTED RACIAL DISPARATE IMPACT DOES NOT VIOLATE TITLE VII

The Second Circuit panel made it clear that the rule that governs this case is that an employer cannot, as a matter of law, be held liable under Title VII for refusing to certify the results of a selection procedure found to have an undisputed adverse impact on African Americans or other minority groups. As the appeals court put it, New Haven's Civil Service Board "found itself in the unfortunate position of having no good alternatives." By not certifying the exam results, the Board "was simply trying to fulfill its obligations under Title VII when confronted with test results that had a disproportionate racial impact[;] its actions were protected." 530 F.3d at 87. The court of appeals' approach flows directly from the text of the statute and its settled interpretation. As early as *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), it has been clear that in addition to prohibiting disparate treatment, Title VIII also outlaws practices that, although not the product of intentional

discrimination, erect unnecessary barriers to employment opportunity for minority groups.

The plaintiff's *prima facie* case under this so-called "disparate impact" theory consists simply of showing that the employer uses a selection procedure that has a disparate impact on a racial minority or other Title VII- protected group. Once this *prima facie* case is made, the burden of persuasion shifts to the employer to show that the selection procedure is "job related" and justified by "business necessity": "Once it is . . . shown that the employment standards are discriminatory in effect, the employer must meet 'the burden of showing that any given requirement (has) . . . a manifest relationship to the employment in question.'" *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977) (quoting *Griggs*, 401 U.S. at 432).[5]

Congress codified the disparate-impact theory of discrimination in the Civil Rights Act of 1991 amendments to Title VII. Now, under § 703(k)(1)(A)) of Title VII, 42 U.S.C. § 2000e-2(k)(1)(A), an employer commits an unlawful employment practice "based on disparate impact" if

> (i) a complaining party demonstrates that [the employer] uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the [employer] fails to demonstrate that the challenged practice is job related for the position

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[5] The terms "business necessity," "job related" and "manifest relationship" tend to be used interchangeably. *See Griggs*, 401 U.S. at 431; *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 998 (1988); *e.g.*, *Gulino v. N.Y. State Educ. Dep't*, 460 F.3d 361, 382-83 (2d Cir. 2006).

> in question and consistent with business necessity); or
>
> (ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

Rejecting contrary signals from this Court's decision in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), Congress in § 703(k)(1)(A) squarely placed the burden of persuasion on the employer if the plaintiff is able to demonstrate that a selection procedure has a disparate impact.[6] "If plaintiff meets that burden and no business necessity defense is asserted, plaintiff wins." Rosemary Alito, *Disparate Impact Discrimination under the 1991 Civil Rights Act*, 45 RUTGERS L. REV. 1011, 1022 (1993).

The touchstone of this statutory scheme is disparate impact, which, if shown, establishes a presumptive violation of § 703(k). Once it became clear to the City of New Haven that its promotional examinations for Captain and Lieutenant vacancies had a disparate impact on its African-American and Hispanic employees taking the tests, the options open to the City under Title VII were quite limited. It could try to discount the disparate-impact showing.[7] But as petitioners' own silence on this score

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[6] Under § 701(m) of Title VII, 42 U.S.C. § 2000e(m), also a product of the 1991 amendments, "[t]he term 'demonstrates' means meets the burden of production and persuasion."

[7] *Cf.* § 703(k)(1)(B)(ii) ("If the [employer] demonstrates that a specific employment practice does not cause the disparate impact, the [employer] shall not be required to demonstrate that such practice is required by business necessity.").

illustrates, such impeachment would have been exceedingly difficult: the District Court found passing rates for African Americans and Hispanics well below the EEOC's and other federal agencies' 80% mark, even putting aside the fact that no African Americans and only two Hispanics would have been eligible for a promotion under the challenged test results.[8] Given the undisputed disparate impact of the test results, the City really only had two options: (1) certify the test results and attempt to justify its use of the test results, under the content-validity method of empirical validation, in the face of the City Charter's Rule of Three requiring rank order selection and judicial authority banning the use of rounding, *see* note 2 *supra*[9]; or (2) withhold

[8] This Court has accepted lesser disparate-impact showings. *See Griggs*, 401 U.S. at 430 n.6 (pass-rate comparisons based on census statistics and EEOC decisions involving other companies); *Dothard*, 433 U.S. at 329-30 (fail-rate comparisons for height and weight restrictions based on national data). The *Dothard* Court expressly stated: "There is no requirement . . . that a statistical showing of disproportionate impact must always be based on an analysis of the characteristics of actual applicants. . . . The plaintiffs in a case such as this are not required to exhaust every possible source of evidence, if the evidence actually presented on its face conspicuously demonstrates a job requirement's grossly discriminatory impact." *Id.* at 330-31.

[9] Public employers using the content-validity method of validation have had difficulty justifying the use of ranking and cutoff scores. *See, e.g., Isabel v. City of Memphis*, 404 F.3d 404 (6th Cir. 2005); *Lanning v. S.E. Penn. Transp. Auth.*, 308 F.3d 286 (3d Cir. 2002); *Guardians Ass'n v. Civil Service Comm'n*, 630 F.2d 79 (2d Cir. 1980). Some courts have *required* or approved banding of examination scores and promotion within bands in such circumstances. *See, e.g., Bridgeport Guardians, Inc. v. City of Bridgeport*, 933 F.2d 1140 (2d Cir. 1991); *Biondo v. City of Chicago*, 382 F.3d 680 (7th Cir. 2004); *Chicago*

certification of the test results and explore alternative selection procedures that might have less disparate impact. The City opted for the latter—a choice that furthers Title VII objectives and does not violate Title VII.

No decision of this Court or other court (of which we are aware) holds that an employer violates Title VII when it refuses to certify test results having an undisputed disparate impact. Certainly, if the City of New Haven had been sued by African-American and Hispanic employees for making promotions on the basis of the test results at issue, it could have settled the suit without violating Title VII by agreeing to discontinue use of the test results. Nothing in Title VII requires that a lawsuit be brought to reach the same end. Indeed, "Congress intended voluntary compliance to be the preferred means of achieving the objectives of Title VII." *Local 93, Int'l Ass'n of Firefighters*, 478 U.S. 501, 515 (1986); *see Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 545 (1999) (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975)) ("Dissuading employers from implementing programs or policies to prevent discrimination in the workplace is directly contrary to the purposes underlying Title VII. The statute's 'primary objective' is 'a prophylactic one.'"); *Faragher v. Boca Raton*, 524 U.S. 775, 806 (1998) (statute aims, chiefly, "not to provide redress but to avoid harm"); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 764

(continued...)

Firefighters Local 2 v. City of Chicago, 249 F.3d 649 (7th Cir. 2001). These approaches were not available to the City of New Haven because of the strictures of state and local law.

(1998) (with respect to sexual harassment, "for example, Title VII is designed to encourage the creation of antiharassment policies and effective grievance mechanisms"); 29 C.F.R. § 1608.1(b) ("Congress strongly encouraged employers . . . to act on a voluntary basis to modify employment practices and systems which constituted barriers to equal employment opportunity.").

As Justice O'Connor noted in *Johnson v. Transportation Agency*, 480 U.S. 616 (1987), "[w]hile employers must have a firm basis for concluding that remedial action is necessary," employers are not required "to prove that they actually discriminated against women or minorities. Employers are 'trapped between the competing hazards of liability to minorities if affirmative action *is not* taken to remedy apparent employment discrimination and liability to nonminorities if affirmative action is taken.'" *Id.* at 652 (O'Connor, J., concurring in the judgment) (emphasis in original & citations omitted).

This case is indeed stronger than the voluntary remedial setting of *Johnson* and other decisions. Here, the City of New Haven was confronted with a presumptive violation if it certified the challenged test results and began to make promotions from the top scorers. It did not violate Title VII by refusing to certify the test results and thus removing the source of the presumptive violation.

II. A "PRETEXT" CASE CANNOT BE BASED ON AN EMPLOYER'S OBLIGATIONS TO MONITOR THE RESULTS OF SELECTION PROCEDURES FOR DISPARATE IMPACT AND TO TAKE APPROPRIATE STEPS TO ADDRESS ANY DISPARATE IMPACT

The central premise of Petitioners' pretext claim is that racial consciousness pervaded the City of New Haven's consideration of whether to certify the challenged test results or, instead, explore alternative selection procedures that might have a lesser disparate impact. However, a showing of pretext cannot be predicated on such facts because employers are expected, if not required, by the Uniform Guidelines for Employees Selection Procedure ("UGESP" or "Uniform Guidelines"), promulgated by the EEOC and other leading federal agencies responsible for enforcement of Title VII and other equal employment laws, to monitor test results for possible racial disparate impact and to take appropriate steps to address such disparate impact.[10]

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[10]Employers acting in good–faith reliance "any written interpretation or opinion" of the EEOC are entitled to immunity under § 713(b) of Title VII, 42 U.S.C. § 2000e-12(b):

> In any action or proceeding based on any alleged unlawful employment practice, no person shall be subject to any liability or punishment for or on account of (1) the commission by such person of an unlawful employment practice if he pleads and proves that the act or omission complained of was in good faith, in conformity with, and in reliance on any written interpretation or opinion of the [Equal Employment Opportunity] Commission. . . .

A. Petitioner's "Racial Consciousness" Contention Ignores the Employer's Duty to Monitor the Disparate Impact of Employment Tests

The employer's duty to monitor the results of selection procedures for disparate impact derives primarily from the Uniform Guidelines, 29 C.F.R. §§ 1607.1 *et seq.*, cited in *Connecticut v. Teal*, 457 U.S. 440, 444 (1982).[11] Succeeding the EEOC's Guidelines on Employee Selection Procedures, cited in *Griggs*, 401 U.S. at 433 n.9; *Washington v. Davis*, 426 U.S. 229, 247 n.13 (1976), and relied upon in *Albermarle Paper*, 422 U.S. at 431, the Uniform Guidelines were adopted on August 25, 1978 by the EEOC, the Civil Service Commission (now called the Office of Personnel Management), the Department of Justice, and the Department of Labor's Office of Federal Contract Compliance Programs), and went into effect on September 25, 1978. The Uniform Guidelines apply to all "selection procedures which are used as a basis for making employment decisions," 29 C.F.R. § 1607.2(C), including pencil-and-paper tests, assessment centers, interview protocols, work samples, and nonscored evaluations.

The Uniform Guidelines require both public and private employers to monitor and maintain records

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[11] The Court has not passed on the binding effect of the Uniform Guidelines. With regard to the EEOC's Guidelines, which preceded the UGESP, it has stated that although "[t]he EEOC Guidelines are not administrative 'regulations' promulgated pursuant to formal procedures established by the Congress . . . they do constitute '(t)he administrative interpretation of [Title VII] by the enforcing agency,' and consequently they are 'entitled to great deference.'" *Albermarle Paper*, 422 U.S. at 431 (quoting *Griggs*, 401 U.S. at 433-34).

on the impact of selection procedures on the various groups protected by Title VII and other federal laws. Under § 1607.4(A), "[e]ach user should maintain and have available for inspection records or other information which will disclose the impact which its tests and other selection procedures have upon employment opportunities of persons by identifiable race, sex, or ethnic group . . . in order to determine compliance with these guidelines." 29 C.F.R. § 1607.4(A). Under § 1607.15(A)(2), users are required to "maintain and have available for each job information on adverse impact of the selection process for that job"; and "[a]dverse impact determinations should be made at least annually for each such group which constitutes at least 2 percent of the labor force in the relevant labor area or 2 percent of the applicable workforce." *Id.* § 1607.15(A)(2). Where users have not "maintained data on adverse impact as required by the documentation section of applicable guidelines," then "the Federal enforcement agencies may draw an inference of adverse impact of the selection process from the failure of the user to maintain such data, if the user has an underutilization of a group in the job category, as compared to the group's representation in the relevant labor market or, in the case of jobs filled from within, the applicable workforce." *Id.* § 1607.4(D).

This Court previously has taken note of the employer's duty under the Uniform Guidelines to monitor the disparate impact of scored and other selection procedures. In *Wards Cove Packing Co. v. Atonio,* 490 U.S. 642, 657-58 (1989), the Court stated that "employers falling within the scope of the Uniform Guidelines on Employee Selection

Procedures . . . are required to 'maintain . . . records or other information which will disclose the impact which its tests and other selection procedures have upon employment opportunities of persons by identifiable race, sex, or ethnic group(s)' . . . This includes records concerning 'the individual components of the selection process' where there is a significant disparity in the selection rates of whites and nonwhites." *Id.* (citing 29 C.F.R. §§ 1607.4(A) and (C)).[12]

B. Petitioners' "Racial Consciousness" Contention Ignores the Employer's Duty to Consider Alternative Selection Procedures with Lesser Disparate Impact

In addition to record-keeping obligations, employers have an obligation to consider alternative selection procedures with lesser disparate impact on Title VII-protected groups. The obligation derives from the so-called "pretext" stage of the disparate-impact mode of proof, as recognized by this Court, first in *Albemarle Paper*, 422 U.S. at 425, and codified in the 1991 enactment of § 701(k)(1)(A)(ii). Thus, even where the employer demonstrates that its selection procedure is "job related for the position in

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[12] In *Johnson*, the Court upheld a public agency's plan to consider as one factor the gender of a qualified applicant when making promotions within a job classification in which women had been significantly underrepresented. The plan encouraged coordination with the County Planning Department in compiling data on the percentage of minorities and women in the local labor force actually working in the job classifications: "From the outset, therefore, the Plan sought annually to develop even more refined measures of the underrepresentation in each job category that required attention." 480 U.S. at 635.

question and consistent with business necessity," it is still possible for the complaining party to show that "other selection devices without a similar discriminatory effect would also 'serve the employer's legitimate interest in efficient and trustworthy workmanship.'" *Dothard*, 433 U.S. at 329 (citations and internal quotation omitted). In the face of this statutory framework, no responsible employer faced with test results having an undisputed disparate impact would limit itself to the formal validation effort underway for the selection procedure in question without at the same time considering alternative ways of reaching the same organizational goals but with lesser disparate impact.

The Uniform Guidelines oblige all test users to engage in the consideration of alternative selection procedures, including "suitable alternative methods of using the selection procedure," with lesser disparate impact:

> Where two or more selection procedures are available which serve the user's legitimate interest in efficient and trustworthy workmanship, and which are substantially equally valid for a given purpose, the user should use the procedure which has been demonstrated to have the lesser adverse impact. Accordingly, whenever a validity study is called for by these guidelines, the user should include, as part of the validity study, an investigation of suitable alternative selection procedures and suitable alternative methods of using the selection procedure which have as little adverse impact as possible, to determine the appropriateness of using or validating

> them in accord with these guidelines.... Whenever the user is shown an alternative selection procedure with evidence of less adverse impact and substantial evidence of validity for the same job in similar circumstances, the user should investigate it to determine the appropriateness of using or validating it in accord with these guidelines.

29 C.F.R. § 1607.3(B). [13]

Given this integrated framework of statutory and administrative obligations imposed on employers as test users, petitioners have no basis to argue that mere "racial consciousness" establishes pretext—in other words, that a Title VII violation can be based on evidence that City of New Haven was engaged in monitoring test results for possible adverse impact on its African-American and Hispanic employee-applicants and that it declined to certify the challenged test results because of evidence of such impact and the need to consider alternative procedures or uses of selection procedures, *see* note 8 *supra,* that might have a lesser racial impact.

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[13] Industrial psychologists are increasingly urging greater consideration of alternative procedures and methods of using procedures. *See, e.g.*, Robert E. Ployhart & Brian C. Holtz, *The Diversity-Validity Dilemma: Strategies for Reducing Racioethnic and Sex Subgroup Differences and Adverse Impact in Selection*, 61 PERSONNEL PSYCH. 153 (Spring 2008); David A. Kravitz, *The Diversity-Validity Dilemma: Beyond Selection – The Role of Affirmative Action*, 61 PERSONNEL PSYCH. 173 (Spring 2008); Transcript of Meeting of May 16, 2007 of U.S. Equal Employment Opportunity Comm'n, at 36 ff, *available at* www.eeoc.gov/abouteeoc/meetings/5-16-07/transcript.html (presentations of Drs. Outtz and Lundquist).

III. TITLE VII ALLOWS EMPLOYERS CONSIDERABLE FLEXIBILITY IN DECIDING HOW BEST TO ADDRESS DISPARATE-IMPACT ISSUES

Title VII and authoritative agency guidance accord employers and other test users significant discretion in deciding how best to address disparate-impact issues: whether to proceed with a given selection procedure subject to completion of a validation effort; whether to modify expected uses so as to ensure that the scoring and ranking of scores are valid and fair; or whether to substitute a different selection process with a lesser disparate impact on particular groups.

A. Employers are Not Required to Conduct or Complete Validation Studies

Petitioners make much of the fact that respondents commenced a validation effort in the initial design of the challenged examinations, suggesting that the failure to complete that effort reflects pretextual racial discrimination. This contention betrays a misunderstanding of applicable legal requirements and sound professional practice.

Nothing in the text of Title VII, the decisions of this Court or the authoritative administrative guidance of the EEOC and other federal agencies requires a formal empirical validation in every case or the completion of a validation effort once undertaken.[14] First, the Uniform Guidelines "apply

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[14] This Court's "cases make it clear that employers are not required, even when defending standardized or objective tests, to introduce formal 'validation studies' showing that particular criteria predict actual on-the-job performance." *Watson*, 487 U.S. at 998 (O'Connor, J., concurring). Lower-court decisions also recognize "formal validation may be either functionally

only to selection procedures which are *used* as a basis for making employment decisions." 29 C.F.R. § 1607.2(B) (emphasis supplied). It is "[t]he *use* of any selection procedure which has an adverse impact . . . [that] will be considered to be discriminatory and inconsistent with these guidelines, unless the procedure has been validated in accordance with these guidelines, or the provisions of section 6 of this part . . . are satisfied." *Id.* § 1607.3(A) (emphasis supplied). Section 6 expressly states that "'[a] user may choose to utilize alternative selection procedures in order to eliminate adverse impact or as part of an affirmative action program." *Id.* § 1607.6(A) (emphasis supplied). In this case, the challenged test results which had an adverse impact were simply not used; and hence there was no obligation to begin or complete a validation study.

Second, by refusing to certify the test results and thus removing the source of the disparate impact, there was no obligation even under the Uniform Guidelines to pursue any validation effort. The UGESP makes clear that disparate impact is an essential trigger: "These guidelines do not require a user to conduct validity studies of selection procedures where no adverse impact results." 29 C.F.R. § 1607.1.

That the City of New Haven commenced a formal validation effort in initially deciding which selection procedure to use but did not complete that effort after learning of the disparate impact of the test results,

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(continued...)

impossible or inadequate as a measure of the test's job relatedness." *Gulino*, 460 F.3d at 385-86.

cannot be evidence of pretextual discrimination. This is because the City was required by the Uniform Guidelines to demonstrate the validity of *both* the initial design of the tests and their ultimate use in making employment decisions. The City's reliance on expert assistance in the initial design of an employment test was essential because the critical first steps in fashioning a job-related promotions test are an empirical analysis of the jobs for which the tests will be used (called a "job analysis") and the selection of test instruments that themselves constitute "a representative sample of the work behavior(s), or a representative sample of a knowledge, skill, or ability as used as a part of a work behavior and necessary for that behavior. . . ." 29 C.F.R. § 1607.15(C)(5).[15] But the City was not locked into one path—completing the validation effort—because, under the Uniform Guidelines, it still had to justify how it would *use* the test results having an adverse disparate impact:

> The evidence of both the validity and utility of a selection procedure should support the method the user chooses for operational use of the procedure, if that method of use has a greater adverse impact than another method of use. *Evidence which may be sufficient to support the use of a selection procedure on a pass/fail (screening) basis may be insufficient to support the use of the same procedure on a ranking basis under these guidelines.*

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[15] The City in this case employed a content-validity strategy authorized under the UGESP, 29 C.F.R. § 1607.15(C).

Id. § 1607.5(G) (emphasis supplied).[16]

B. Employers are not Engaged in Pretextual Discrimination When they Decline to Certify Test Results Rather than Engage in a Full-Blown Validation Effort

It was open to the City, and not evidence of pretextual discrimination, to avoid the burdens and legal uncertainty of attempting empirical validation for any particular method of use of the test results, especially when state and local law, *see* note 2 *supra*, constrained how those results could be used.

Completion of a validation study would not necessarily have provided immunity from liability. "Validation studies 'are by their nature difficult, expensive, time consuming and rarely, if ever, free of error.'" *Ass'n of Mexican-Am. Educators v. California*, 231 F.3d 572, 587 (9th Cir. 2000) (citations omitted). And they are especially difficult, expensive and error-prone where state civil service and local laws, *see* note 2 *supra*, require use of scored written examinations for promotion decisions and, in this case, limit the employer to making selections from the top three test scorers without regard to whether differences in scores reflect real differences in underlying abilities.

As previous decisions indicate, the use of rank ordering was a particular susceptible aspect of the challenged selection procedure in this case. For example:

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[16] Record-keeping requirements on the methods of use, under the content-validity strategy, are found in 29 C.F.R. § 1607.15(C)(7).

- In *Guardians Association v. Civil Service Commission*, 630 F.2d 79, 89 (2d Cir. 1980), an extensive formal content-validity study was held not to justify the New York police department's use of rank ordering in making hiring decisions.
- In *Isabel v. City of Memphis*, 404 F.3d 404, 413-15 (6th Cir. 2004), the appeals court ruled that the Memphis police department had not sufficiently justified the cut-off score it used, even though it had conducted an extensive validation study, and lowered the cutoff score to reduce disparate impact.
- In *Lanning v. Southeastern Pennsylvania Transportation Authority (SEPTA)*, 181 F.3d 478 (3d Cir. 1999), SEPTA had utilized a physical capacity exam for selecting transit police officers after extensive validation studies. The district court accepted expert testimony that the aerobic fitness requirements were "readily justifiable," but the Third Circuit determined that the cutoff scores might have been "unnecessarily high," and remanded for a more searching review of whether the validation study was valid. *Id.* at 492-93. While the district court ultimately ruled in SEPTA's favor on remand (*Lanning v. Southeastern Transp. Authority*, 2000 WL 1790125 (E.D. Pa. Dec 7, 2000), *aff'd*, 308 F.3d 286 (3d Cir. 2002)), this outcome required three more years of litigation.

Petitioners simply have no basis in the record for their contention that the City of New Haven's concern with the undisputed disparate impact of the

challenged examinations and the likely difficulty it would face in justifying use of rank ordering and selections drawn exclusively from the top test scorers without banding was a form of pretextual racial discrimination violative of Title VII.

IV. AN EMPLOYER'S REFUSAL TO CERTIFY TEST RESULTS DOES NOT CONSTITUTE "RACE NORMING" IN VIOLATION OF SECTION 703(l) OF TITLE VII

Petitioners also claim that the City of New Haven's refusal to certify the challenged test results violates § 703(l) of Title VII, which provides that employers may not, "in connection with the selection or referral of applicants or candidates for employment or promotion, . . . adjust the scores of, use different scores for, or otherwise alter the results of, employment related tests on the basis of race. . . ." 42 U.S.C. § 2000e-2(l). Even if this argument had been properly preserved, it is without merit. For several reasons, the provision simply does not apply in this case. In the first place, § 703(l) applies only in the case of "employment related tests"; the tests in question have not been shown by petitioners to be "employment related tests" and they certainly have not demonstrated that the use of rank ordering would be in conformity with the Uniform Guidelines. Second, it is doubtful there was any "use" of test scores or "alter[ation]" of test results when the City of New Haven simply declined to certify test results. Finally, the argument fails to address the fact that the provision seeks principally to reach different cutoff scores for different races and racial readjustment of scores—what is often referred to as "race norming." No such conduct is alleged to have

occurred in this case. *See Hayden v. County of Nassau*, 180 F.3d 42, 53 (2d Cir. 1999) ("The legislative history of the statute . . . confirms that it intended to prohibit 'race norming' and other methods of using different cut-offs for different races or altering scores based on race. In the case before us, the 1994 exam was scored in the same manner for all applicants; no differential cutoffs were employed. Thus, appellants fail to adequately allege a claim under § [703(l)].") (emphasis in original & citations omitted).

CONCLUSION

The Court should affirm the judgment of the Second Circuit.

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March 25, 2009

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